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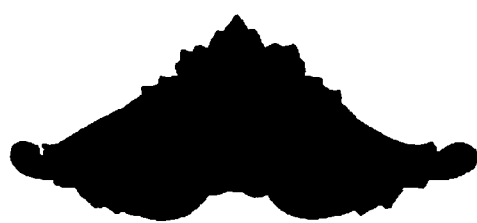
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THE
LAW OF SCOTLAND
IN RELATION TO
WILLS AND SUCCESSION;

INCLUDING THE SUBJECTS OF
INTESTATE SUCCESSION, AND THE CONSTRUCTION OF WILLS,
ENTAILS, AND TRUST-SETTLEMENTS.

BY
JOHN M^cLAREN, Esq.,
/ ADVOCATE.

IN TWO VOLUMES.

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THE LAW OF SCOTLAND

IN RELATION TO

WILLS AND SUCCESSION.

CHAPTER XLII.

DISPOSITIONS AND BEQUESTS, WHETHER VESTED OR CONTINGENT.

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| I. <i>Generalities.</i> | III. <i>Legacies payable at the Expiration of</i> |
| II. <i>Marriage-Contract Provisions, and Pro-</i> | <i>Liferent Interests.</i> |
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| | <i>Annuities.</i> |

SECTION I.

GENERALITIES.

1391. An interest is said to *vest* in a beneficiary when he is pos-
sessed of a *jus crediti* or indefeasible right to it,—such right being,
according to the law of property, transmissible to his heirs and as-
signees. Conversely, an interest does not vest while the benefi-
ciary's right is contingent or defeasible; and accordingly, if a bene-
ficiary die before the occurrence of the event on which his right of
succession is made contingent, his interest lapses, and does not pass
to his representatives.

Definition of
vesting.

1392. It follows, from the definition of vesting, that an interest
in a succession cannot vest before the death of the testator. Dur-
ing his lifetime the bequest is liable to be defeated by the exercise
of the testator's right of revocation, and the interest of the benefi-
ciary is no more than a *spes successionis*. Rights arising under mar-
riage-contracts and provisions to children, which in certain cases are
held to vest in the lifetime of the parent, are not proper rights of
succession, though, from their intimate connection with the general

A succession
cannot vest
until the testa-
tor's death.

CHAPTER XLII.

subject, it has been thought proper to include such cases in our examination of the law of vesting.

Questions as to the period of vesting only arise when the distribution is postponed.

1393. Simple testamentary dispositions (*i.e.*, for distribution at the death of the testator) present few or none of those questions in relation to vesting which we are now to examine. But there are few trust-settlements in which the distribution of the estate is not at least partially dependent upon circumstances which do not necessarily emerge upon the death of the testator. It is, then, in the case of the distribution being appointed to take place at a period subsequent to the testator's death, that the question arises, When does the succession vest?—in other words, when does the right given under the testamentary instrument cease to be contingent?

Elements of the problem :

- (1) Time ;
- (2) Person ;
- (3) Interest.

1394. Every question in the law of vesting may be considered as a problem involving three indeterminate elements, the specific ascertainment of which is the object of investigation. These elements are—(1) the time of payment ; (2) the person to whom payment is to be made ; and (3) the extent and quality of the interest taken by such person. The conditions may of course be different for different bequests given by the same instrument. Where, in the given case, the provisions of the settlement are positive and exclusive of uncertainty with respect to the person, the interest, and the period of payment, a vested right is of necessity conferred upon the beneficiary as soon as the settlement comes into operation,—that is, from the death of the testator in the case of testamentary settlements ; from the date of marriage in the case of antenuptial contracts ; and from the date of delivery in the case of other settlements *inter vivos*. When the three elements in question, although not definitely ascertained by the terms of the settlement itself, are afterwards determined by the occurrence of an event, whether before the death of the testator or at a subsequent period, a vested interest obviously accrues at the period when the contingency is purified. The result is, that the beneficial interest vests in all cases as soon as the extent and quality of the interest, the period of payment, and the person to whom payment is to be made, are specifically ascertained.

The succession vests as soon as the elements of time, person, and interest are specifically ascertained.

Vesting usually depends upon an event, involving the elements above mentioned.

1395. In the greater number of cases of postponed vesting, uncertainty attaches to more than one of the elements of time, person, and interest ; each of those elements being dependent upon others, and forming with them a complex condition, technically called “an event.” Where such is the case, the question, who is entitled to succeed, does not admit of being determined until the event shall happen ; and the Court will not attempt the solution of the question in anticipation of the circumstances upon which the

succession is eventually to be determined.(a) The events upon which a succession is most usually dependent are, the majority or marriage of the legatee, the birth of children, and the condition that the legatee must survive the distribution, which is implied in an institution of survivors or destination over. The two circumstances which are favourable to the supposition of a vested interest being taken (where the distribution is postponed) are these—(1) a gift of the intermediate income from the period of the testator's death; (2) the grant of the power of disposal or bequest, which may be given either in express terms, or by implication, *e.g.*, by giving the legacy to the institute, his heirs and assignees.(b)

1396. With the view of avoiding the inconvenience and expense consequent upon a judicial determination of the period of vesting, the testator sometimes declares the period at which his succession shall be held to vest; and where this is done intelligently, and with the object of removing doubts as to the intention, the introduction of such a clause is unobjectionable. The appointment of an arbitrary period of vesting—*e.g.*, that the right shall not vest until "actual payment,"(c)—is to be deprecated, as involving a contradiction between expressed and implied intention which is more likely to create embarrassment in the construction of the deed than to remove difficulties. The case of *Croom's Trs. v. Adams*,(d) shows the necessity of adapting the conventional term of vesting to the circumstances of the destination. In that case, the vesting of the succession was appointed to take place as at the death of the testator, but the payment of certain shares of the residue was postponed until the arrival of the beneficiaries at majority, and subject to a conditional institution of the survivors. One of the beneficiaries died in minority, leaving a will by which she disposed of her interest in the succession; and it was held that the contingent interests of the survivors could not be defeated by an assignation anterior to the period of payment, and to this extent the will was held ineffectual. "I have often thought," said Lord J.-C. Inglis, "and may have remarked, that it would be desirable, in order to avoid the difficulties which arise in the construction of settlements

The testator may declare at what period his succession shall be held to vest.

Effect of repugnancy between such declaration and the trust purposes.
Croom's Trs. v. Adams.

(a) *Harvey v. Harvey's Trs.*, 28 June 1860, 22 D. 1810; *Baillie v. Seton*, 16 Dec. 1853, 16 D. 216; *Ferrie v. Ferrie*, 23 Feb. 1849, 11 D. 704.

(b) *Johns v. Munro's Trs.*, 29 Nov. 1838, 12 Sh. 146; *Clark's Executors v. Paterson*, 5 Dec. 1851, 14 D. 141.

(c) The Courts, both here and in England, have in general disregarded such ex-

pressions, as being contrary to the principle that the right of the beneficiary cannot be affected by the laches of the trustee. See *Leighton v. Leighton*, 8 March 1867, 5 Macph. 561; *Scott v. Scott*, 12 July 1860, 22 D. 1420; *Martin v. Martin*, L. R. 2 Eq. Ca. 404; and see p. 414.

(d) *Croom's Trs. v. Adams*, 30 Nov. 1859, 22 D. 45.

CHAPTER XLII. as to the period of vesting, that testators should expressly declare when the vesting is to take place. Here, however, the testator has done so expressly, and thence has arisen the whole difficulty in the case; so I fear that is a very doubtful remedy."^(e) Where the term of vesting is by express words postponed, there will in general be less difficulty in reconciling such a provision with the dispositions of the will than in the case of its being anticipated; but the reports of decided cases prove that the appointment of a conventional period of vesting does not always relieve the trustees from the necessity of applying for judicial instruction as to the distribution of the testamentary succession.^(f)

SECTION II.

MARRIAGE-CONTRACT PROVISIONS, AND PROVISIONS TO CHILDREN *NASCITURI*.

Provisions in favour of a class of objects vest in the class as soon as the settlement comes into operation.

1397. The rule applicable to cases of this description, is, that a provision in favour of a family of children vests in the family from the time that the will or settlement comes into operation,—the right of the individual members of the class of objects being provisional, and subject to the emerging claims of other members who may afterwards come into existence. The period when the succession vests in the class of objects is determined by the characters of the provisions, which may be thus distinguished.

Rules for determining the vesting of marriage provisions, and provisions to children *nascituri*.

1398. (1) Marriage-contract provisions unsecured (where the period of the payment is either indeterminate or is fixed at the dissolution of the marriage) vest at the dissolution of the marriage.^(g) (2) Where estate is conveyed to trustees under a marriage-contract, or relative disposition, for behoof of the children of the marriage, the right is held to vest in the children at the birth of the eldest; and the existence of a liferent right in the persons of either or both of the parents (according to the usual tenor of such destinations) does not keep open the vesting during the suspension of payment.^(h) (3) A direct conveyance in a marriage-contract to the spouses in liferent (under restriction to their liferent use), and to the children in fee, is subject to the same interpretation as a destination in a trust-settlement,—the principle being, that the liferenters take a

(e) 22 D. 49.

(f) See *Brown v. Campbell*, 16 March 1855, 17 D. 759; *Earl of Lauderdale v. Royle's Executor*, 19 May 1830, 8 Sh. 771; *Thorburn v. Thorburn*, 16 Feb. 1836, 14 Sh. 485.

(g) *Grant's Trs. v. Anderson's Trs.*, 1 Feb. 1866, 4 Macph. 386; *Rogerson's Tr. v. Rogerson*, 10 March 1865, 3 Macph. 684.

(h) *Beattie's Trs. v. Cooper's Trs.*, *infra*.

fiduciary fee for behoof of the children to be born of the marriage.(i) CHAPTER XLII.

(4) Estate destined in a will or testamentary disposition to a family of children, vests provisionally in those of the children who survive the testator, to the exclusion of such as predecease him, and subject to the emerging claims of children who may subsequently be born.(k) (5) Provisions to individual children, constituted by a delivered or irrevocable deed of provision, vest at the date of the deed.(l)

1399. Some approximation to the principles here enunciated may be found in the reports of decisions anterior to the case of *Beattie's Trustees*;(m) but, as the points involved in them had not been very directly raised, the Court, in disposing of that case, took the opportunity of reviewing the legal doctrines applicable to the vesting of beneficial interests destined to classes of objects, and to children to be born. The propositions laid down in the preceding paragraph embrace the substance of the judgment of the Court in that case. Elements of difficulty, which result from the application of the principle of immediate vesting to such cases are noticed in the opinion of the Court, as delivered by Lord Curriehill.(n) But withstanding those difficulties the judges of the First Division of the Court were unanimously of opinion, both on the authorities and in principle, that the possibility of the class of objects being increased by births would not prevent the acquisition of a vested interest by children already born. The authorities that were chiefly relied on are, the case of *Falconer v. Moncrieff*,(o) where a family of children, to whom estate was destined by marriage-contract, were held, in a question with the father's creditors, to have a vested interest in their provisions; the case of *Watson v. Marjoribanks*,(p) a leading case, where a deed in execution of a power of division among children, was held to be inept on the ground of the omission to appoint a share to the representatives of a child who died during the subsistence of the marriage; and a *dictum* of Lord Braxfield,(q)

Import of the decisions on the subject of the vesting of provisions to families.

(i) Cases in notes (g) and (h), *supra*, and see *Fyffe v. Fyffe*, 18 July 1841, 3 D. 1205.

(k) *Carleton v. Thomson*, 3 Macph. 514; 30 July 1867, Law Rep. 1 Sc. Ap. 232, 5 Macph. H. L. 151; *Biggar's Trs. v. Biggar*, 17 Nov. 1858, 21 D. 4; *Wood v. Wood*, 18 Jan. 1861, 23 D. 338.

(l) *Napier v. Orr*, 18 Nov. 1864, 3 Macph. 57. See *Allardice v. Lautour*, 31 Jan. 1845, 7 D. 362; *Campbell v. Pollock*, 1720, Roberts. 324.

(m) *Beattie's Trs. v. Cooper's Trs.*, 14 Feb. 1862, 24 D. 519, 535; *Romanes v. Riddell*,

13 Jan. 1865, 3 Macph. 348,—see Lord Colonsay's opinion, *in fin.*

(n) 24 D. 534.

(o) *Falconer v. M'Arthur*, 20 Jan. 1825, 3 Sh. 455, N.E. 317. The point here decided appears to be substantially the same as that involved in the decision of the leading cases of *Herries, Farquhar & Co., Browning, and Goddard*, as to which see chapter 28, sect. 2 (Marriage-Contract Provisions).

(p) *Watson v. Marjoribanks*, 17 Feb. 1837, 15 Sh. 586.

(q) In *Preston v. Wellwood*, 1791, Bell's Oct. Ca. 198. See also *Calder v. Dickson*,

CHAPTER XLII. to the effect that a "fiduciary fee" has all the qualities of a beneficial interest under a trust. Subsequent decisions have confirmed the rule laid down by Lord Curriehill, without developing any new principle requiring to be specially noticed. (r)

Representatives of children predeceasing held entitled to share.

1400. As a consequence of the principle, that an interest given to a family vests in the children where the right accrues during the subsistence of the marriage, it follows that, in the ultimate division at the dissolution of the marriage, the representatives, legal (s) or testamentary, (t) of children who were surviving, or who came into existence after the right vested, are entitled to share in the distribution of the estate.

At what period the division of the fund may be made.

The construction may, of course, be modified by an express declaration, that the fund is to be divided amongst the children in existence at a particular time. (u) And where the period of distribution is fixed by the testator to be at a time when there is a possibility of the birth of other children, the children in existence at the time have a right to call upon the trustee to denude in their favour, and the Court will not impose upon them the condition of finding caution for the shares of such children. (x) If no period of distribution is prescribed, it would seem that the trust must be kept up until the dissolution of the marriage, or until the death of the parent to whose children the provision is granted. However, where a provision is in favour of the children of a lady of advanced age, the Court may authorise payment to be made to the existing children, (y) or to the conditional institute where there are no children, (z) upon caution to repeat. (a)

Effect of survivorship clauses, etc., in causing a suspension of the period of vesting.

1401. The vesting of a provision to children of a family may be suspended by the operation of a destination to survivors, or other legatees, according to the principle, and subject to the limitations

4 June 1842, 4 D. 1865; *Scott v. Scott*, 7 Bell, 151, per Lord Brougham, and *Forbes v. Luckie*, 26 Jan. 1838, 16 Sh. 374.

(r) *Supra*, notes (k) and (m).

(s) *Beattie's Trs. v. Cooper's Trs.*, *supra*, 2d and 5th points; *Watson v. Marjoribanks*, *supra*.

(t) *Forbes v. Luckie*, *supra*.

(u) *Lockhart v. Scott*, 26 Feb. 1858, 20 D. 690.

(x) *Biggar's Trs. v. Biggar*, 17 Nov. 1858, 21 D. 4; *Wood v. Wood*, *supra*.

(y) *Scheniman v. Wilson*, 25 June 1828, 6 Sh. 1019. In *Hardman v. Guthrie*, 6 June 1828, 6 Sh. 920, the children were, in similar circumstances, held entitled to an alimentary allowance out of the fund.

(z) *Blackwood's case*, 11 Sh. 699.

(a) Reference is made to chap. 88 (Destinations to Children) on the subject of conjunct destinations, and the vesting of the formal title in the parent or *nominatim* disponent for behoof of children *nascituri*; also vol. 1, p. 716, on the subject of designative destinations to heirs.

(b) See *Broomfield v. Campbell*, 24 Nov. 1835, 14 Sh. 51, where the provisions were declared not to be payable until after the father's death, and the surviving children were conditionally instituted; *Sterling v. Baird's Trs.*, 12 Nov. 1851, 14 D. 20; *Boyle v. Earl of Glasgow's Trs.*, 14 May 1858, 20 D. 925.

stated in the sequel. Where there is a liferent right extending over the entire subject, ulterior destinations will, in general, be held to refer to the termination of the liferent, and the vesting will be suspended until that time. (b) In the case of annuities, the presumption is for immediate vesting. (c) The first point was the subject of consideration by the whole Court in *Boyle v. Earl of Glasgow's Trs.*, (d) though the actual case was not attended with serious difficulty, because, by the terms of the destination, the fee was given, on the death of the surviving spouse, to the children *then existing*. In regard to annuities, the most authoritative decision is *Pursell v. Newbigging*, as decided on appeal, (e) where Lords Cranworth and St Leonards laid down that the fact of an annuity being charged on the fee would not, in ordinary circumstances, necessitate a suspension. In the previous cases of *Provan v. Provan* (f) and *Johnston v. Johnston*, (g) where the vesting of provisions in favour of a class of children was held to be suspended, the period of distribution was expressly postponed, and payment was directed to be made in the one case to the survivors, and in the other to the survivors and their heirs; so that the ulterior destinations were, by the terms of the deeds, made referable to the expiration of the annuity.

Case of a fee burdened with an annuity.

1402. It is a frequent subject of provision, in bequests to a family of children, that, in the event of any of the children dying and leaving issue, such issue shall succeed to the parents. Where the bequest vests from birth in the children, as a class, such a clause makes no alteration on the rights of the issue of a deceased child; where, on the contrary, the term of vesting is postponed, and one of the children predeceases that term, the effect of the clause seems to be exactly equivalent to that of the implied condition *si sine liberis*. A clause instituting the issue of children dying before a certain term is not to be construed as a disinherison of the heirs of those children who die *without issue*; or, which is the same thing, as implying that the shares of those who die without issue do not vest. (h)

Effect of a conditional institution of issue of members of the class.

1403. The subsistence of a power of *division* does not prevent the fund from vesting in the objects amongst whom it is to be divided, where these are a family or fixed number of persons. (i) It is other-

Effect of a power of division.

(c) *Pursell v. Newbigging*, *infra*.

(d) *Supra*, note (b).

(e) *Pursell v. Newbigging*, 10 May 1855, 2 Macq. 278; see 276.

(f) *Provan v. Provan*, 14 Jan. 1840, 2 D. 298.

(g) *Johnston v. Johnston*, 9 June 1840, 2 D. 1038.

(h) This point was noticed in *Beattie's Trs. v. Cooper's Trs.*, 24 D. 534. As to whether the expression of the implied condition *si sine liberis* has a suspensive operation in regard to the shares of legatees who have children born to them, see § 1422, *infra*.

(i) *Sivright v. Dallas*, 27 Jan. 1824, 2

CHAPTER XLII. wise in the case of a general power to distribute amongst relatives, which necessarily implies a right of selection as well as of division. (j)

SECTION III.

LEGACIES PAYABLE AT THE EXPIRATION OF LIFERENT INTERESTS.

Postponement of payment to the death of a liferenter does not prevent the estate from vesting.

1404. Next in the order of consideration is the case of a bequest, given to persons named or ascertained, the payment of which is deferred to an event certain to arrive. The event to which the distribution of a succession is most usually deferred, is that of the death of the liferenter of the subject, the succession to which is in question. (k) The creation of a life interest has necessarily the effect of postponing the payment of the capital to the death of the liferenter, that is, to an event certain; and in the absence of any contingent destination, the fee will vest, on the principles already explained, *a morte testatoris*. To suppose that the interest of the truster's heir-at-law or residuary legatee is sufficient to prevent the acquisition of a vested interest, would be to assume the question; for, *ex hypothesi*, no ulterior interest is given under the terms of the bequest, and none can accrue *ex lege*, unless on the supposition that the vesting of the legacy is suspended. (l)

Legacy in separate shares.

1405. In the early case of *Fowke v. Duncan*, (m) where the effect of simple postponement of payment upon vesting was made the subject of elaborate argument, the testator bequeathed, *inter alia*, to his two nephews one-half of his personal estate, in the proportion of two-thirds to the one, and one-third to the other; and, by a separate clause, he gave a life interest to his wife of his whole personal estate, contingent on her continuing unmarried. One of the legatees predeceased the liferentrix. It was maintained on behalf of the next of kin, on the authority of Voet and Stair, (n) and of two previous cases, (o) that, as it was uncertain whether the time at

Sh. 648, N. E. 548; *Cowan v. Crawford*, 20 Jan. 1837, 15 Sh. 399; *Watson v. Marjoribanks*, 17 Feb. 1837, 15 Sh. 586; *Wood v. Wood*, 18 Jan. 1861, 23 D. 328; *Romanes v. Riddell*, 18 Jan. 1865, 3 Macph. 848.

(j) *M'Cormack v. Barber*, 25 Jan. 1861, 23 D. 398.

(k) Some instances of postponement to a definite interval of time are cited in chapter 34 (Conditions in Legacies).

(l) It is scarcely necessary to add that the interposition of a trust (which, in the case of a money provision, is necessary to

preserve the interest of the heirs) does not prevent the acquisition of an immediate vested interest by the beneficiary. See *Nimmo v. Murray's Trs.*, 8 June 1864, 2 Macph. 1144.

(m) *Fowke v. Duncan*, 1770, M. 8092. According to the doctrine of *Young v. Robertson*, *infra*, p. 16, this was a bad decision upon the construction of the will.

(n) Voet, ad Pand. lib. 36, tit. 2, sec. 2; Stair, 1, 3, 7.

(o) *Edgar v. Edgar*, 1665, M. 6825; *Belshes v. Belshes*, 1677, M. 6827.

which the legacies became due—viz., the wife's death—should ever arise during the lifetime of the legatees, the case was one of those acknowledged in the civil law, where the adjection of an uncertain day rendered the legacy conditional; more especially as there was a destination over to survivors, "in the event of any of the legatees dying without issue before my will takes place." The Court, however, ruled that the legacies vested in the legatees at the testator's death, and sustained the claim of the surviving legatee and his heirs to the entire provision. (p)

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Where a clause of survivorship is, by the terms of the will, referable to the period of the testator's death, the vesting is immediate.

1406. In the case of *Wallace v. Wallace*, (q) the question was raised more simply upon the construction of a direction to trustees after the decease of the longest liver of the testator and his spouse, "to content and pay, or assign and make over, to the persons after named, the respective sums of money after specified," viz., *inter alia*, a legacy of £1000 to A. W., a nephew (who survived the testator, but predeceased his widow). The Court, adhering to the principle established in the case of *Duncan*, found that the legacy vested in A. W. at the decease of the testator, and passed to his representatives. The case of *Jordan* (r) presents the circumstances of the two previous cases in combination. In regard to the residue, which was appointed to be equally divided at the death of the widow among four individuals named, it was a precise counterpart of the case of *Wallace*; while in regard to two general legacies which were given subject to a provision of survivorship, and a third which was subject to a destination over, it left room for the special argument maintained in the case of *Duncan*. The Court, in this case, were of opinion that the ulterior destinations were intended to take effect at the period of the testator's death, and consequently, that the vesting of the legacy was referable to that period.

1407. In the two following cases reliance was placed on the circumstance of the bequest having been given to a family of children, as indicating an intention to reserve the benefit of the provision to the survivors at the term of the expiration of the liferent. In *Forbes v. Luckie*, (s) the direction was, after the death of the testator's daughter, to whom a liferent was given, to pay the residue to the whole children of her body, share and share alike. The view taken by the Court is very distinctly expressed in the following passage in the leading opinion:—"I do not think that the fee of the residue was prevented from vesting in these children, either by the

A destination to the survivors at the period of distribution is not implied in a legacy to a family of children.

(p) M. 8095, 8098.

(r) *Jordan v. Dickson*, 22 June 1809,

(q) *Wallace v. Wallace*, 1807, M. "Clause,"

Hume, 268.

App. No. 6; *Grant v. Grant*, 1794, Bell, Fol. Ca. 2.

(s) *Forbes v. Luckie*, 26 Jan. 1838, 16 Sh. 374.

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circumstance that the term of paying to each child his respective share was postponed until after the death of the liferentrix, who survived the testator; or by the circumstance that a trust by executors was interposed for carrying into effect the intentions of the testator; or, finally, by the circumstance that the bequest of the residue was conceived in favour of a class of persons, and not in favour of certain individuals *nominatim*.” (t) The other case to which we refer (u) differed from *Forbes v. Luckie* only in that the provision consisted of shares of succession, which were made payable at the respective majorities or marriages of the children. That condition was purified by the attainment of majority on the part of all the children before the institution of the action; and the judges were unanimously of opinion that the subsistence of the liferent did not interfere with the vesting of the succession at the prescribed period.

Contingent destinations affecting one part of the succession do not necessitate suspension as to the rest.

1408. In a subsequent case, (x) the residue of the testator's estate was divided into two equal shares, and, subject to the widow's liferent, one of the shares was appropriated to the payment of two legacies, and the other was given to the survivors of a family of children at the expiration of a second liferent carved out of their share. The vesting of the second half being evidently subject to postponement, it was argued that the vesting of the first half would fall to be postponed to the same term, on the ground that the testator must be presumed to have contemplated one period of division for the entire estate. The Court seem to have found some difficulty in arriving at the conclusion, that the legacies constituting the first of the two shares vested *a morte testatoris*. There can be little doubt, however, that the decisions in this case, as well as in the similar case of *Sterling v. Baird's Trs.* (y) were correct, there being nothing in the circumstances of the cases which could be held to constitute an exception to the rule of immediate vesting.

Vesting not affected by liferent or fee being given to a plurality of persons;

1409. We proceed to the consideration of the cases involving postponement of payment until the expiration of a plurality of life interests. Where liferent interests are given to a plurality of persons in shares, the fee being payable either to one person or to several, the fact of the life interest being divided will not affect the question of vesting, any more than the division of the fee would.

Calder v. Dickson.

Calder v. Dickson, (z) decided by Lord Jeffrey in the Outer-House, is a direct authority. The will directed a division of the residue of

(t) *Per* Lord Corehouse, 16 Sh. 378.

(u) *Matthew v. Scott*, 21 Feb. 1844, 6 D. 718.

(x) *Kilgour v. Kilgour*, 18 Feb. 1845, 7 D. 451.

(y) *Sterling v. Baird's Trs.*, 12 Nov. 1851, 14 D. 20. See also *Hamilton v. Rattray*, 21 Feb. 1868.

(z) *Calder v. Dickson*, 4 June 1842, 4 D. 1365.

the estate into six shares, as to two of which the testator provided in the following terms, viz.: One-sixth to his sister A. in life-rent; and the other one-sixth to his sister B., also in life-rent; and the principal or fee of the said two-sixths so to be life-rented to be paid, on the death of any of his said sisters, to the daughters of his brother, and of his sisters C., D., and E., equally among them, share and share alike. Certain of the testator's nieces having died during the subsistence of the life-rent interest, it was argued on behalf of the survivors that as the fee was destined to the nieces, not *nominatim* or individually, but as a class and by description only, there was the less reason to hold that the right to it was intended to vest when the life-rent began to run, more especially as that class might not only be diminished by intermediate deaths, but increased by the birth of other objects between the demise of the testator and that of the life-rentrix. Lord Jeffrey had no doubt that every one of the nieces surviving the testator took a vested right to a share of the fund, though the extent of their individual interests might be affected by the birth of other objects of the class. But as in that case there was no probable expectation of the birth of other objects, his Lordship, on the authority of the case of *Scheniman v. Wilson*,^(a) gave decree for immediate payment. The judgment is chiefly valuable for the distinct enunciation of the principle upon which the suspension of vesting depends. Referring to the elements of intention, which were, in his Lordship's opinion, material to the question of vesting, he said, "One is, that there is here no ulterior destination of the fee in the event of the failure of all the nieces to whom it is expressly provided; and the other, that there is no constitution of any accreting right to the survivors in the event of the failure of some of them, although provisions for such accreting rights are made in other parts of the settlement, and as to other portions of the trust property."^(b)

1410. In the cases of *Smith v. Lauder*,^(c) and *Maxwell v. Wylie*,^(d) life-rent interests were given to certain persons and the survivor of them; and it was held that this did not suspend the vesting of the fee, although it involved the continuance of usufructuary interests for two lives. The case of *Maxwell* involved the specialty that the residuary interest, life-rented by the testator's sisters; was given in fee to his *next of kin*, the life-renters being of the next of kin. It was held that the existence of a life-rent inter-

nor by the circumstance that one of the life-renters has also an interest in the fee.

^(a) *Scheniman v. Wilson*, 25 June 1828, 6 Sh. 1019.

^(c) *Smith v. Lauder*, 30 May 1834, 12 Sh. 646.

^(b) 4 D. 1367. See also *Rutherford v. Turnbull*, 30 May 1821, 1 Sh. 88, N. E. 37.

^(d) *Maxwell v. Wylie*, 35 May 1837, 15 Sh. 1005.

CHAPTER XLII. est was not incompatible with that of a fee in the same person ; and, as a question of intention, it was thought that the testator's sisters were not otherwise disinherited, merely because a life interest was given to them, and that they were in fact instituted heirs of the fee, or reversion, in their character of next of kin.(e)

Effect of words
of exclusion.

1411. In a recent case, where a legacy was given, upon the expiration of a life interest, to a class of persons, excepting the person who should succeed to the lands of X. and Y., it was held that the right vested *a morte testatoris*, notwithstanding the uncertainty in regard to the person excluded.(f) Where, by the words of a will, a succession was appointed to be distributed amongst persons of a specified class, "alive at the time of distribution," the vesting was, on the contrary, held to be suspended, by reason of the condition of survivance applicable at the period of distribution.(g)

SECTION IV.

LEGACIES GIVEN SUBJECT TO PAYMENT OF ANNUITIES.

Presumption for
immediate vest-
ing in the case
of legacies bur-
dened with fixed
annuities.

1412. The cases examined in the preceding section establish the proposition, that a legacy burdened with a total liferent vests *a morte testatoris*, where the bequest is free from the element of contingency arising from the introduction of a destination to survivors or others. In the case of legacies burdened with fixed annuities, the introduction of a destination to survivors does not, as a rule, prevent the acquisition of an immediate vested interest by the legatees or institutes answering the description at the death of the testator ; and for this reason, that to every effect, except that of payment of the annuity, the subject vests in possession, and the fiar, even where the capital is retained by the trustees for securing the payment of the annuity, is entitled to the benefit of the surplus income. An annuity, especially when charged on residue, does not necessarily deprive the fiar of the possession of his estate, but, on the contrary, may be cleared off by means of a present payment, or secured by an adequate investment.(h) Accordingly, it was observed by Lord Cranworth, in the case of *Pursell v. Newbigging*,(i) that it would require much stronger language to satisfy the Court that there was an intention to suspend in the case of an annuity, than in that of a liferent.

(e) 15 Sh. 1011, *per* Lord Gillies.

(f) *Douglas v. Douglas*, 31 March 1864, 2 Macph. 1008 ; *Cunningham v. Cunningham*, 6 July, 1858, 20 D. 1214.

(g) *Cockburn's Trs. v. Dundas*, 10 June 1864, 2 Macph. 1186. See as to clauses of survivorship, chapter 40, sect. 3.

(h) *Wilson v. Beveridge*, 31 Jan. 1833, 11 Sh. 343 ; *Dobie v. Milne*, 18 Feb. 1828, 6 Sh. 586 ; *Grieve's Trs. v. Bethune*, 9 June 1830, 8 Sh. 896 ; *Forsyth v. Kilgour*, 15 Dec. 1854, 17 D. 208.

(i) *Pursell v. Newbigging*, 10 May 1855, 2 Macq. 276.

1413. Where there is no ulterior destination of the fee, the right to it will vest *a morte testatoris*, as of course, in accordance with the principle above stated. (k) The distinction in the law of vesting between annuities and liferents only arises in the case of deeds containing contingent destinations; in such cases, there is not the same presumption for suspension during the subsistence of the annuity that exists in the case of a liferent. Nor will a clause by which the payment of the capital is postponed to the death of the annuitant, even when coupled with a destination to survivors or others, be decisive of the question of vesting; for, the question being one of degree, the Court will be guided by the apparent intention of the testator, as collected from the whole will. (l)

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Where distribution expressly postponed, vesting resolves into question of intention.

1414. In addition to the cases of *Pursell*, *Kerr*, and *Watson*, already cited—in all of which the residue was held to vest *a morte testatoris* notwithstanding the terms of the destination—we may refer to the two earlier cases of *Dobie v. Milne* (m) and *Bruce v. Moir*; (n) the one relating to a provision of heritage, the other to a residue of moveable estate, where annuities were held to be no bar to the acquisition of an immediate vested interest by the fiars. In the more recent cases of *L'Amy v. Nicolson's Trs.* (o) and *Dickson v. Halbert*, (p) the presumption was also held to be for immediate vesting. In the former case, accordingly, it was found that the legatees were entitled to payment, by anticipation, upon the annuitant agreeing to renounce her right.

Examples of immediate vesting where estate charged with payment of annuity.

1415. In some cases the vesting of legacies has been held to be suspended during the subsistence of annuities, upon the ground of special intention. In the cases of *Provan* and *Johnston*, (q) annuities were settled on married ladies, and the reversion, which was destined to their children, was retained to preserve the interest of children *nascituri*. The same explanation may be given of the case of *Thornhill v. Macpherson*. (r) In other cases the vesting was held to be suspended, because, by the express terms of the settlement, the fund was to be paid over, on the *death* of the annuitant, to the surviving institute *at that time*. (s) So also in *Pearson v. Cassamaijor*, (t)

Where vesting held to be suspended in respect of special intention.

(k) *Kerr v. James*, 12 Feb. 1858, 20 D. 562.

(l) *Watson v. Macdougall*, 4 June 1856, 18 D. 971.

(m) *Dobie v. Milne*, *supra*.

(n) *Bruce v. Moir*, 28 June 1838, 11 Sh. 799.

(o) *L'Amy v. Nicolson's Trs.*, 5 Dec. 1850, 18 D. 240.

(p) *Dickson v. Halbert*, 13 Feb. 1851, 13 D. 675.

(q) *Provan v. Provan*; *Johnston v. Johnston*, cited *supra*, § 1401.

(r) *Thornhill v. Macpherson*, 20 Jan. 1841, 8 D. 394.

(s) *Ferrie v. Ferrie*, 23 Feb. 1849, 11 D. 704; *Robertson v. Davidson*, 24 Nov. 1846, 9 D. 152.

(t) *Pearson v. Cassamaijor*, 16 Dec. 1836, 15 Sh. 275; 18 July 1839, M.L. & Rob. 685.

CHAPTER XLII. a direction to pay to certain parties, or the *survivors* of them, when the capital sums "become tangible by the death of the said annuitants respectively," was justly held to import a postponement of vesting as well as of payment. Those cases, however, are exceptional in their character, and do not invalidate the general proposition. (u)

(a) The effect of clauses of survivorship, annuities, is also considered in a separate chapter on Survivorship, *supra*, § 1840.
in legacies burdened with the payment of

CHAPTER XLIII.

VESTING OF CONTINGENT DESTINATIONS.

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| <p>I. <i>Legacies containing Destinations to Survivors or to conditional Institutes.</i></p> <p>II. <i>Legacies payable at the Majority or Marriage of the Legatee.</i></p> | <p>III. <i>Legacies given subject to a Power of Disposal or Distribution.</i></p> <p>IV. <i>Deferred Liferents and Annuities.</i></p> |
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SECTION I.

LEGACIES CONTAINING DESTINATIONS TO SURVIVORS OR TO
CONDITIONAL INSTITUTES.

1416. As it is an elementary principle in the law of vesting, that a condition annexed to a legacy prevents the acquisition of a vested right prior to the purification of the condition, it is apparent that, where the payment of a legacy is made contingent on the uncertain event of the legatee's survivance of the period of distribution, no right will accrue to him unless he survive that period. (a) This simple proposition might be illustrated by supposing the case of a legacy payable to A. B. in the event of his surviving C. D., a liferenter. But this is not a style of contingent destination likely to occur in practice. The modes in which a beneficial interest is rendered contingent on the legatee's survivance of the period of distribution, are, by the insertion of a destination over to a conditional institute, to take effect in the event of the institute dying before the term of payment; or, in the case of legacies to a plurality of persons, by the insertion of a destination to the legatees jointly, and to the survivors of them.

Rule that a condition annexed to a legacy renders the gift contingent.

1417. When no period of failure is specified, the natural construction of words importing a destination over or right of survivorship, is that which makes them have relation to the period of dis-

Words of survivorship are referable to the period of distribution, unless a contrary intention is expressed.

(a) The subject of conditions in legacies having been examined in a separate chapter, it is unnecessary to complicate the discussion by reverting to this somewhat exceptional category of cases. The contingencies discussed in this and the next consecutive chapter, are those which result from the form of the destination.

CHAPTER XLIII. tribution ; and such is the presumable construction according to all the authorities. The element of "intention" cannot be said to enter into the construction, unless in cases where the testator expressly applies the destination to the case of the institute dying before him. In other cases, the presumption is that the contingent interest of the substituted legatee continues until the trust comes to an end.

Young v. Robertson
(*Donaldson's Trs.*).

1418. The leading case, having regard to the attention and time bestowed upon it in its different stages, as well as to the eminence of the Court by which the ultimate decision was pronounced, is *Young v. Robertson*.^(b) The estate was burdened with a liferent of the whole residue in favour of the testator's widow, and the ultimate purpose of the trust was expressed in the following terms :— "I will and direct the said trustees to account for, pay, and divide, or convey . . . the whole residue and remainder of my property, subjects, means, and estate, heritable and moveable, real and personal, or proceeds thereof, after the death of the last liver of me and my said wife, equally to and among [five persons designated], equally, or share and share alike, and to their respective heirs or assignees, declaring that if any of said residuary legatees die without leaving lawful issue *before his or her share vest* in the party or parties so deceasing, the same shall belong to, and be divided equally, or share and share alike, among the survivors of my said grandnephews," etc. The testator was survived by his widow ; two of the residuary legatees died during the dependence of her life interest, and the question was, whether any interest was taken by their personal representatives ? A majority of the judges of the Court of Session, putting a special construction upon the words printed in italics, held that the testator meant by that expression to refer the operation of the clause of survivorship to the usual period of vesting, namely, the period of his death. But the House of Lords, taking a broader view of the case, held that there was no specification of a determinate period of vesting, and that the presumption was for postponement to the period of distribution.

Effect of a destination over distinguished from that of a clause of survivorship.

1419. Referring to the preceding chapter upon survivorship for an exposition of the doctrine of the suspension of vesting consequent upon the conditional institution of survivors, we pass to the more debateable ground of the effect in relation to vesting of destinations over to strangers. The presumption that the vesting of the succession is suspended during the continuance of a liferent, is not so strong in the case of a destination over to other legatees, as in the case of destinations to survivors ; and for this reason : A legacy to a

(b) *Young v. Robertson*, 14 Feb. 1862, 4 Macq. 814, reversing 22 D. 1527 (*nom. Donaldson's Trs. v. Macdougall*).

class of persons vests in the surviving members of the class *a morte testatoris* by the mere force of the words of institution, without any express destination to survivors. Where such a destination occurs, a distinct meaning is given to it only by assuming it to have reference to the period of distribution. But a destination over is equally satisfied whatever time it is referred to. (c)

1420. Before entering more fully into the cases upon the construction of contingent destinations, it will be necessary to premise that a destination to the heirs, or heirs and assignees, of the legatee, is not in law a contingent destination to the effect of keeping open the vesting during the suspension of payment; because the heir in this, as in other cases, is identified with the institute, and is not held to be individually instituted. Destinations to heirs are held to be inserted merely with the view of preventing a lapse, in the case of the legatee predeceasing the testator. After there is a possibility of the succession vesting, such a destination has no meaning, or means only that the succession shall vest, being simply the expression of the legal doctrine that a vested interest enures to heirs and assignees. (d) Accordingly, it will be seen from the cases that the nomination of heirs and assignees, so far from constituting a contingent destination, is presumed to indicate an intention to confer a vested interest.

Destination to the "heirs and assignees" of the legatee is not a contingent destination.

1421. Thus, where a lady conveyed a sum of £1000 to trustees, with a direction to apply the yearly interest as an annuity to her nephew during his life, the principal to be "divided and applied" for behoof of certain other legatees, "and their respective heirs in case of their death," and one of these legatees, Mrs B., after surviving the testatrix, died before the expiration of the life interest, it was held that her share had vested at the death of the testatrix, and was carried by her general disposition in favour of her husband, to the exclusion of her next of kin. (e) "The mere mention of her heirs," said Lord Jeffrey, Ordinary, "can never, after the cases of *Crawford* and *Leitch*, warrant the supposition that the trust was created in any degree for the purpose of protecting the conditional institution of unknown parties, by depriving the only named heir of the power of disposal; it being manifest, in the Lord Ordinary's apprehension, that these words were introduced, not with any view of suspending the vesting, but solely to meet the contingency of Mrs B. herself predeceasing the testator, and the legacy conse-

Marchbanks v. Brockie.

Lord Jeffrey's opinion.

(c) *Carlton v. Thomson*, 30 July 1867, L. R. 1 Sc. Ap. 282, 286; 5 Macph. H. L. 151.

Donaldson's Trs., 22 D. 1535, which on this point is not affected by the reversal.

(e) *Marchbanks v. Brockie*, 18 Feb. 1836,

(d) See joint opinion in the case of 14 Sh. 521.

CHAPTER XLIII. quently lapsing." (*f*) It does not detract from the weight of this decision that the cases of *Russell v. Crawford's Trs.*(*g*) and *Smith v. Leitch*,(*h*) on which the Lord Ordinary founded, where legacies were held to have vested in a last substitute, were not very apposite to the subject of decision,—a circumstance which was noticed by Lord Justice-Clerk Boyle in moving the affirmance of the Lord Ordinary's interlocutor. In the subsequent case of *Cochrane v. Cochrane's Executors*,(*i*) where a legacy of £150 and a share of residue were made payable to John Cochrane, "or his heirs," six months after the testator's death, and when the same was freed from the life interest of his spouse, the case was treated as one of first impression; Lord Colonsay remarking, as to the meaning of the phrase "or his heirs," that it was only introduced for the purpose of preventing the lapsing of the legacy.

Destination over to legatee's children, whether held to make the gift contingent.

1422. A destination to the *children* of a legatee, must be construed upon different principles from a destination to heirs. Where the legatee is not within the degree of relationship to the testator in which a conditional institution would be implied by law, it is clear that an express conditional institution of the legatee's children must be considered a contingent destination; but where, in consequence of the legatee's relationship to the testator, his children would be entitled under the implied condition, it may fairly be held that the expressed condition has reference to the legatee predeceasing the testator, and that no postponement of vesting is designed. (*k*) According to Professor Bell, the expression of the *conditio si sine liberis decesserit*, has so far a different construction from the implied condition, that the mere existence of the child will make the condition effectual, unless the survivance or the actual succession of the child be specified in the condition. (*l*)

(*f*) 14 Sh. 524.

(*g*) *Russell v. Macdowall*, 6 Feb. 1824, F.C.

(*h*) *Smith v. Leitch*, 4 Sh. 659, N.E. 665, 17 Feb. 1829, 3 W. & S. 366.

(*i*) *Cochrane v. Cochrane's Exrs.* 29 Nov. 1854, 17 D. 108. In *Douglas v. Douglas*, 31 March 1864, 2 Macph. 1008, a limitation to "heirs, executors and successors" was in like manner disregarded, and the succession held to be vested. On the question, when a nomination of heirs and assignees has the effect of a conditional institution, see Chapter 37 (Conditional Institution.)

(*k*) *Pretty v. Newbigging*, 1 March 1854, 16 D. 667; *Foulis v. Foulis*, 3 Feb. 1857,

19 D. 362. But where issue are made the objects of a proper conditional institution (*i.e.*, so as to take an original share along with survivors, and not merely the share that would have fallen to their parents), the construction is the same as in the case of a destination over to strangers; and in a case of this nature, the vesting was held to be postponed; *Laing v. Barclay*, 20 July 1865, 3 Macph. 1143; *Romanes v. Riddell*, 18 Jan. 1865, 3 Macph. 348.

(*l*) Bell's Pr. § 1782, citing *Ballantyne v. Scott*, 1687, M. 2953; *Watt v. Forrest*, 1702, M. 2954; *Royston v. Haliburton*, 1715, M. 2955, and *Robertson v. Robertson*, 22 Jan. 1833, 11 Sh. 297.

1423. We proceed now to a general survey of the cases in which the Court has applied the principle, that contingent limitations are suspensive of vesting, to destinations where the fee is subjected to the burden of a life interest. In the important case of *Wright v. Ogilvie*,^(m) where there was a series of substitutions on failure of the legatee, the Judges of the First Division of the Court were unanimously of opinion that the capital of the trust-fund did not vest until the death of the truster's widow, who had a life interest in the estate; and in *Ross v. King*,⁽ⁿ⁾ the same result was held to follow, in consequence of the institution of a series of heirs in a trust conveyance of heritable property. The doctrine, that a destination over is adverse to the acquisition of a vested interest at the death of the testator, had already been recognised in the case of a trust-settlement of moveable property for behoof of the testator's daughter in liferent and her children in fee, with remainder to the testator's heirs and assignees whatsoever;^(o) and the judgment in this case, which proceeded on a careful review of all the previous decisions, has been frequently cited as a ruling authority.

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Examples of the suspension of vesting consequent upon a destination over.

1424. We observed in the outset that the presumption for immediate vesting is stronger in the case of a conditional institution of strangers than in that of survivors. The more recent cases seem to establish the rule, that wherever a conditional institution of strangers can fairly be supposed to be intended to meet the contingency of there being no objects of the class primarily instituted in existence at the death of the settlor or testator, it will receive that interpretation; and the birth of such objects will accordingly be held to evacuate the ulterior destination, and to vest the right in the class primarily instituted.^(p) Where the primary legatee predeceases the testator, the interest vests *a morte testatoris* in the

Presumption for vesting stronger in the case of a conditional institution than in that of a provision of survivorship.

^(m) *Wright v. Ogilvie*, 9 July 1840, 2 D. 1857. See also *Home v. Home*, 28 Jan. 1807, Hume, 530; *Jordan v. Dickson*, 22 June 1809, Hume, 268; *Smith v. Leitch*, 4 Sh. 659, N. E. 665, 17 Feb. 1829, 3 W. & S. 366.

⁽ⁿ⁾ *Ross v. King*, 22 June 1847, 9 D. 1327.

^(o) *Thomson v. Scougall*, 12 Sh. 911; 31 Aug. 1835, 2 S. & M'L. 305.

^(p) *Carleton v. Thompson*, 3 Macph. 514; 30 July 1867, L. R. 1 Sc. Ap. 232, 5 Macph. 151. The observations of Lord Colonsay, in giving judgment in the appeal (reported since this chapter was written), tend to confirm the distinction taken in the text between the effect of survivorship and condi-

tional institution, and to negative the theory of suspension in cases involving only the latter element. See also *Martin's Trs. v. Milliken*, 24 Dec. 1864, 3 Macph. 326 (destination over to testator's heirs by father's and mother's side, one-half to each); *Balfour v. Balfour*, 20 Jan. 1864, 2 Macph. 467 (destination over to sisters and brothers of the father of the primary legatees). In the above cases the interest was held to vest *a morte testatoris* or at birth in the primary legatees. To the principle stated in the text may also be referred the earlier cases of *Robson v. Shireff*, 20 July 1853, 15 D. 297; and *Marnock v. Wilson*, 2 March 1855, 17 D. 536.

CHAPTER XLIII. substituted legatees;(q) and the same construction necessarily prevails where the bequest is given to the legatee expressly in the event of his survivance of the testator, and the conditional institution is thus confined to the contingency of the primary legatee predeceasing the testator.(r)

Vesting, whether affected by contingency in the destination of the antecedent life interest.

1425. The conditional institution of liferenters is subject to the same construction as that of fiars.(s) In some of the reported cases, the destination was complicated by the circumstance of the liferent being given to a plurality of persons either in succession or jointly, and to the longest liver.(t) Such variances in the destination of the liferent obviously do not affect the question as to the vesting of the beneficial interest in the fee. The cases of *Buchanan v. Downie*,(u), and *Vines v. Hillou*,(x) are examples of the suspension of vesting pending the subsistence of joint liferents,—the cause of suspension being, in the one case, a provision of survivorship; in the other, a destination over. In the case of *Robertson v. Houston*,(y) where the instrument—a marriage-contract—gave the liferent to the longest liver of the spouses and the fee to the *surviving* children of the marriage, the survivorship was held to refer to the expiration of the second liferent, when the estate would be available for distribution.

SECTION II.

LEGACIES PAYABLE AT THE MAJORITY OR MARRIAGE OF THE LEGATEE.

Introductory.

1426. Next to the preservation of life interests, the most frequent cause of the postponement of the distribution of a succession is a direction to trustees to retain the capital of a fund provided to minor children during their minorities, or to pay the provisions to them on their respectively attaining majority or being married. The difficulty, in this class of cases, consists in the ascertaining whether the testator had the intention of keeping open the vesting during the suspension of payment, and thus making the provisions contingent upon the attainment of the required age or status; or, on the

(q) *Lockwood's Trs. v. Falconer*, 11 July 1866, 4 Macph. 1086.

(r) *Campbell v. Campbell's Trs.*, 21 Dec. 1866, 5 Macph. 206.

(s) *Donaldson's Trs. v. Cuthbertson*, 15 Jan. 1864, 2 Macph. 428; see judgment in H. L. 26 March 1868. See section 4, *infra*, as to the vesting of deferred annuities.

(t) See, for example, *Clelland v. Gray*,

15 June 1839, 1 D. 1031; *Wright v. Fraser*, 16 Nov. 1843, 6 D. 78.

(u) *Buchanan v. Downie*, 12 Feb. 1830, 8 Sh. 516.

(x) *Vines v. Hillou*, 13 July 1860, 22 D. 1436.

(y) *Robertson v. Houston*, 28 May 1858, 20 D. 989.

contrary, whether he had the intention of giving a vested interest at the period of his death, while providing for its security by vesting the legal estate in trustees during the period of nonage. CHAPTER XLIII.

1427. In some cases, the testator names a period of life different from that of legal majority, as the term at which payment shall be made, and which has been termed "conventional majority;" (z) as in the cases of *Blackwood v. Dykes*, (a) where trustees were directed to hold heritable property for behoof of the testator's son until he should arrive at the age of twenty-five years, when they were to convey the property to him; and *Reid v. Coates*, (b) where a residue was made payable to the heir on his attaining the age of twenty-seven. In other cases the period of division has been fixed with reference to the age of one of the children of the family; as, for example, on the youngest child attaining majority, (c) or the age of eighteen, (e) or the age of thirty-six. (d) The substitution of a conventional term of division in place of the legal period of majority, obviously does not affect the question of vesting,—the conditions being of the same character; and the same remark may be made with respect to the common provision that daughters' shares shall be payable on their attaining majority or being married, whichever shall first happen. Conventional majority.

1428. It was at one time supposed that the maxim *dies incertus pro conditione habetur* (applicable in its original acceptation to matters of contract) ought to be strictly applied to the interpretation of clauses postponing payment in wills and settlements. This view of the matter would doubtless have removed all difficulties in dealing with the class of cases under consideration; but it would have done so at the cost of interfering with the intentions of testators in a numerous class of cases. Rights emerging at majority or marriage being affected with a radical uncertainty as to whether the beneficiary shall ever attain the age or status upon which payment is made dependent, it would follow, if effect were given to the maxim, that in every family settlement making provision for the care of the property of minors, the period of vesting must be coincident with that of division. The effect of this would be that, unless the will made express provision for the contingency of the Such variances do not affect the vesting of the interest.

(z) *Adam v. Adam's Trs.*, 30 March 1861, 23 D. 859. where the age of majority was anticipated.

(a) *Blackwood v. Dykes*, 26 Feb. 1833, 11 Sh. 443; *Adam v. Adam*, *supra*; *Grant v. Dyer*, 1813, 2 Dow 73. (c) *Scheniman v. Wilson*, 25 June 1828, 6 Sh. 1019.

(b) *Reid v. Coates*, 10 March 1809, F.C. 141. (d) *Clark v. Paterson*, 5 Dec. 1851, 14 D.

See also *Bell v. Mason*, 1749, M. 6382; and *Burnett v. Forbes*, 1783, M. 8105, (e) *Brown v. Campbell*, 16 Mar. 1855, 17 D. 759.

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death of the legatee in minority, his interest would devolve as lapsed succession to the testator's next of kin, instead of going to the heirs of the legatee himself, or to the surviving co-legatees. To avoid this result, it has become an established rule, that, without derogating from the authority of the general presumption as to *dies incertus*, slight evidence of a contrary intention shall suffice to overcome the presumption, and to fix the vesting at the period of the testator's death.

Effect of direction to secure for the benefit of the legatee's family.

1429. Sometimes a testator, while directing that the shares of succession which he has given to minor legatees shall be applied for their benefit on their attaining majority or being married, expresses a wish that the money may be secured for the benefit of their families. Such a direction will not be construed in a sense adverse to vesting, or as imposing on the trustees the duty of keeping up the trust; and any fair settlement that may be executed by the legatee on his marriage will be held to be a sufficient fulfilment of the testamentary intention. (*f*) And where the trust is properly kept up after the attainment of majority, in consequence of the mental incapacity of the legatee, nevertheless the interest is held to vest at majority, or at the age prescribed by the will. (*g*)

Rules for the determination of the vesting of provisions payable at majority or marriage.

1430. Without professing to be able to reconcile all the decisions, we believe the import of the authorities on the vesting of legacies made payable at majority or marriage is correctly represented in the following propositions. (1) Provisions made payable at majority or marriage are, in the absence of any special intention, presumed to vest at the periods at which they are respectively payable. (2) This presumption is strengthened by the circumstance of the provision containing a destination to survivors or others in the event of the death of the primary legatees. (3) A declaration that legacies are to bear interest, or that interest is to be exigible or payable during minority, is held to raise a presumption that the testator intended the provision to vest in the primary legatees; and a direction to hold or stand possessed of a residue for behoof of minor children, seems to be equivalent in legal effect to a gift of the interest, especially where the fund is made chargeable with their maintenance. (4) A destination to the heirs and assignees of the legatee affords a presumption for vesting *a morte testatoris*.

It is *questio voluntatis* whether a residuary interest payable at majority vests, assuming that there is no subsequent destination.

1431. (1) The early cases in this branch of the law of vesting clearly establish the rule, that in the absence of any special intention to the contrary, provisions made payable at majority or marriage do not vest until the arrival of the time of payment. The

(*f*) *Scott's Trs. v. Stack*, 16 June 1865, 3 Macph. 950.

(*g*) *Graham v. Russell*, 1 April 1791, 3 Pat. 210.

case of *Torrie v. The King's Remembrancer* (h) is a leading authority CHAPTER XLIII. upon the general rule. The testator appointed the residue of his heritable and moveable estate to be paid over to his two natural children named in the will, equally betwixt them, share and share alike, and their heirs and assignees, such shares "not to be payable until they shall respectively attain the age of majority or be married." No provision was made for the application of the intermediate income of the estate. The legatees both survived the testator, but one of them died in minority and unmarried. The circumstances of the absence of any appropriation of the interest, and the conditional institution of the legatee's heirs and assignees, (i) were supposed to be so clearly indicative of a suspension of vesting that the question was not raised, the argument for the Crown being founded on the destination to heirs, and the argument for the surviving residuary legatee on the doctrine of the *jus accrescendi*. But the Court, being clearly of opinion that the destination was not joint, and that the Crown could not take under a destination to heirs, preferred the testator's next of kin to a share of residue which lapsed by the death of the legatee in minority. (k)

1432. (2) Referring to the observations in a preceding section as to the general effect of clauses of survivorship and conditional institution, it may simply be observed that such clauses, when occurring in bequests payable at majority or marriage, are generally, if not invariably, held to have relation to survivance at the period of distribution. And first, in the following instances of residuary bequests to children payable at majority, with a destination over, the vesting was held to be postponed to the period of payment; namely, *Stewart's Trs. v. Stewart*, (l) where there was a contingent destination to the testator's brother in the event of there being no children surviving the period of payment; the case of *Blackwood v. Dykes*, (m) where the trust was for conveyance to a second son at the age of twenty-five, with remainder, in the event of his death before obtaining actual possession of the estates, to his issue, whom failing, to the testator's heirs and assignees whatsoever; the case of

Suspension of vesting in consequence of the creation of subsequent interests.

Cases on survivorship clauses and destinations over.

(h) *Torrie v. King's Remembrancer*, 31 May 1832, 10 Sh. 597. See the early cases in *Mor. voce* Implied Condition, pp. 6325-6340; also *Sempill v. Sempill*, 1792, M. 8108; *Home v. Home*, 28 Jan. 1807, Hume, 530; *Grindlay v. Merchant Maiden Hospital*, 1 July 1814, F.C.; and *Arbuthnott v. Arbuthnott*, 7 June 1816, Hume, 586.

(i) This was clearly a mistake. A destination to the legatee's heirs has no suspensive efficacy. *Supra*, § 1420.

(k) A more recent illustration of the application of the general rule in the absence of indications of a contrary intention is found in the case of *Graham Smith's Trs. v. His Legatees*, 4 Dec. 1867.

(l) *Stewart's Trs. v. Stewart*, 17 July 1851, 13 D. 1387.

(m) *Blackwood v. Dykes*, 26 Feb. 1883, 11 Sh. 448.

CHAPTER XLIII. *Wright v. Ogilvie*, (n) where there was a contingent destination, in the event of failure of children, to the widow in alimentary liferent, with remainder to the testator's assignees; and finally, in *Mitchell v. Mitchell*, where the usual conditional institution of issue and survivors was followed by an ulterior destination to the testator's brother. (o) In the following cases, the residue was given to a plurality of persons, and the survivors of them; and the vesting was held to be postponed to the period of payment, from the necessity of preserving the contingent interest of the survivors unimpaired, viz., in the cases of *Greig v. Johnston*, (p) and *Campbell v. Reid*, (q) where the accruing interest of each termly period was held to belong to the children surviving such term; and in the later case of *Walker v. Park*, (r) where a clause of survivorship was found to have the effect of suspending the vesting, notwithstanding an express direction to employ the proceeds of the estate in the maintenance and education of the beneficiaries.

Where right has vested in a family, subject to condition of survivorship, the last survivor takes an immediate vested right.

1433. It has, however, been laid down in subsequent cases, that a bequest to a testator's children, payable to the survivors at a period fixed with reference to the majority of the children, vests in the class from the time of the testator's death. Although, therefore, the individual interests of the children cannot be held to vest *a morte testatoris*, by reason of the uncertainty as to the extent of their several interests, yet if that uncertainty be removed by the death of all but one of the family before the period of division, there does not appear to be any obstacle to the vesting of the succession in the sole survivor. This is the import of the judgments in *Cattanach v. Thom's Exrs.*, (s) where the succession was held to belong to the only son and heir of a last surviving child dying in minority; and in *Maitland's Trs. v. M'Dermid*, (t) where the residue was held to belong to the testamentary heir of a last survivor, dying in minority, in preference to the truster's next of kin. (u)

(n) *Wright v. Ogilvie*, 9 July 1840, 2 D. 1857; See also *Campbell v. Campbell*, 8 Dec. 1852, 15 D. 178; *Croom's Trs. v. Adams*, 30 Nov. 1859, 22 D. 45.

(o) *Mitchell v. Mitchell*, 17 March 1865, 8 Macph. 721.

(p) *Greig v. Johnston*, 1 July 1888, 6 W. & S. 406, affirming 9 Sh. 806.

(q) *Campbell v. Reid*, 12 June 1840, 2 D. 1084.

(r) *Walker v. Park*, 20 Jan. 1859, 21 D. 286.

(s) *Cattanach v. Thom's Exrs.*, 2 July 1858, 20 D. 1206 (first point).

(t) *Maitland's Trs. v. M'Dermid*, 15 March 1861, 23 D. 732. In this case,

the Lord J.-C. Inglis observed, "It is beyond all doubt that the beneficial interest in the truster's estate was vested in his children as a class; though, by the provisions of other clauses, that vesting may be postponed as regards some of the children, and as regards others it may suffer defeasance;" 23 D. 736.

(u) In treating of the effect of clauses of conditional institution, in this class of cases, it is always assumed that the destination is conditioned to take effect upon the death of the legatee in minority and without being married. As to the effect of the use of the word "or" for "and" in this connection, see chapter 20, sect. 8. *in fin.*

1434. (3) Notwithstanding the distinct recognition of the rule, CHAPTER XLIII.
that a direction to pay to legatees on their attaining majority or being married, is a condition keeping open the vesting of the succession, the disturbing element of intention has, from an early period, exercised a very marked influence in the decisions of this class of cases. And, more particularly, a gift of the intermediate income to the original legatees is regarded as evidence of an intention to give them at the same time a vested interest in the capital. This exception to the rule was first recognised in the case of *Wood v. Burnett's Trs.*,^(x) where legacies of £1000 each were bequeathed to the children of a stranger, *the produce thereof to be accounted for yearly*, and the principal sum to be transferred to each legatee as soon as he arrived at the age of majority. The children having all died in minority, it was held that the beneficial interest had vested in their persons *a morte testatoris*, and that their representatives were entitled. The principle there laid down, that a direction to pay interest from the testator's death implies a vested right to the capital, is confirmed by many subsequent decisions,^(y) of which we shall notice only the more important.

Direction to pay interest on legacy favourable to immediate vesting.

1435. In *Kennedy v. Crawford*,^(z) the testator directed his trustees to make payment to the younger children of his son P. C. of the sum of £2000, "equally amongst them, with the lawful interest thereof from the first term of Whitsunday or Martinmas after the said P. C.'s death, should that happen before the children should arrive to majority; my said trustees employing the interest of that sum from the time of my death for the maintenance, clothing, and education of the said younger children during their respective pupilarities and majorities;" and the trustees were further directed to divide the capital of the provision, as soon as the youngest arrived at majority, amongst the surviving children. The Court were much divided in opinion as to whether the legacies vested at the death of the testator; but it was finally determined by a majority that the shares had vested, and were arrestable before the period of payment,—Lord President Boyle observing, that when a sum was appointed to be paid with lawful interest from the testator's death, that implied that the sum itself was to be paid as well as the interest; and that as to the direction to apply the interest towards the maintenance of the children, and to pay up the capital when the youngest child should attain majority, *that* went only to the management, and not

Authorities for rule examined.

(x) *Wood v. Burnett's Trs.*, 2 July 1813, 718; *Kennedy v. Crawford*, and *Ralston v. Ralston*, *infra*.
Hume, 271.

(y) *Matthew v. Scott*, 21 Feb. 1844, 6 D. (z) *Kennedy v. Crawford*, 20 July 1841, 3 D. 1266.

CHAPTER XLIII. to the question of vesting. (a) So also in the case of *Ralston v. Ralston*, where a legacy was made payable to a minor, whom failing, to two other minor children, or the survivor of them, "with the interest thereof from six months after my death, payable the said interest to their legal guardians for their behoof," and the principal was declared to be payable at the period of majority,—the Second Division of the Court were unanimously of opinion that the right to the legacy vested in the institute by his survivance of the testator. (b) Finally, in the recent case of *Nolan v. Hartley's Trs.*, it was held unanimously, on the construction of the original will, that under it the residuary legatees would have taken a vested interest *a morte testatoris*, in consequence of the interest of the fund being expressly given to the legatees to be either advanced to them, or accumulated, in the discretion of the trustees. (c)

Whether direction to hold for behoof of minor children is equivalent to a direction to pay interest.

1436. In *Hamilton v. Dougall*, (d) a special case, trustees were directed to hold a residue of moveable estate for behoof of the truster's natural daughter during her minority, subject to the payment of an annuity; and were further directed to avail themselves of any favourable opportunity for investing the funds on heritable security for behoof of his said daughter and the heirs of her body; whom failing, to the testator's lawful heirs. The legatee having died in minority without issue, the estate was claimed by the Crown, for whom it was maintained, on the authority of the undernoted cases of *Wood* (e) and *Hardman*, (f) that a *jus crediti* vested in the person of the legatee, and devolved to the Crown as *ultima hæres*. The judges appear to have inclined to the opinion that the interest vested; but they held it to be unnecessary to decide the point, being of opinion that the direction implied a proper *substitution* in favour of the testator's heir, who was thus heir of provision *alioqui successurus*.

Destination to heirs and assignees of the legatee implies that the legacy is to vest immediately.

1437. (4) With respect to the effect of a destination to heirs and assignees of minor legatees, as implying that the succession shall vest, the leading case is *Clark's Exrs. v. Paterson*, (g) where

(a) 3 D. 1270.

(b) *Ralston v. Ralston*, 8 July 1842, 4 D. 1496. See also *Wilson v. Wilson*, 9 July 1842, 4 D. 1503—a somewhat special case.

(c) *Nolan v. Hartley's Trs.*, 12 Dec. 1866, 5 Macph. 153. "It was the intention of the testatrix that her grandsons, on her death, should at once have the full enjoyment of their shares of her estate, and I cannot see any indication of an intention of postponing the enjoyment even until they should arrive at majority, for it is expressly directed that the house is to be let, and the

rents divided among them," *per* Lord J.-C. Inglis, p. 156.

(d) *Henderson v. Dougall*, 12 Feb. 1841, 3 D. 548.

(e) *Wood v. Burnett's Trs.*, Hume, 271.

(f) *Hardman v. Guthrie*, 6 June 1828, 6 Sh. 920.

(g) *Clark's Exrs. v. Paterson*, 5 Dec. 1851, 14 D. 141. See also *Henderson v. Dougall*, 12 Feb. 1841, 3 D. 548, where the direction was to hold *for behoof*; and cases cited *supra*, §§ 1420, 1421.

trustees were directed to pay or apply the residue of the testator's estate for behoof of a family of children, including such as might thereafter be born, and their heirs and assignees, share and share alike, and that when the youngest child should attain the age of eighteen. This direction was followed by a clause of survivorship applicable to the event of any of the children "dying intestate, and without heirs of their bodies, before receiving payment." One of the daughters having died before the period of payment, after surviving the testator, it was held that her share had vested in her husband, as her legal assignee, in virtue of the destination to heirs and assignees. "I apprehend," said Lord Fullerton, "that when a legacy is so granted that the legatee has the power of testing upon it, or assigning it, to all intents and purposes that legacy vests unless there is the strongest evidence of an intention that it shall not vest. All that we have here is a postponed term of payment, coupled with these considerations—that there is a power of assigning and a power of testing."^(h) This case does not appear to us to conflict with the decision in *Bell v. Cheape* ⁽ⁱ⁾ upon the question of the assignable character of a beneficial interest; for here the decision was that the succession *had vested*, in which case there could be no doubt that it was an assignable subject, while in *Bell v. Cheape*, the question was, whether a destination to heirs was suspensive of vesting.

1438. The recent case of *Nolan v. Hartley's Trs.* ^(k) raises, for the first time, a question of some nicety and importance as to the effect of the constitution of a liferent *by a codicil* on the vesting of the fee; the shares of which, according to the conception of the will, would have vested *a morte testatoris*, although payable to the legatees only on their attaining majority or being married. Lord J.-C. Inglis (a majority of the Second Division of the Court concurring with him), held that the liferent provision in the codicil must be read as if it were part of the will; and that, as there was a destination to survivors in the will, the presumption was, that the words of survivorship were intended to have relation to the period of distribution appointed by the codicil. "From what was it," his Lordship inquired, "that we were driven to hold that the vesting (under the will) was *a morte testatoris*? From the period of vesting being fixed by the date of division, the date of the testatrix's death; and if by the codicil the date of division is altered and postponed till the death of the liferentrix, must we not give the survivorship clause the same effect at the new date as it would have had, if it

Whether the constitution of a life interest by a codicil suspends the vesting of a fee, which under the will is not affected by contingency.

^(h) 14 D. 145.

^(k) *Nolan v. Hartley's Trs.*, 12 Dec.

⁽ⁱ⁾ *Bell v. Cheape*, 21 May 1845, 7 D. 614. 1866, 5 Macph. 153.

CHAPTER XLIII. had continued to refer to the date under the first deed? The alteration of the time of division alters the period of vesting.”(l) The opinion of Lord Neaves (with which we coincide, and which, in any view, deserves renewed consideration) was, that the subsequent intention expressed in the codicil was confined to the object intended to be benefited by the codicil, namely, the liferenter. It is a question of intention, whether words of survivorship relate to the period of death or to the period of distribution. In this case it is admitted that the original intention was to benefit survivors at the testator’s death; and although the presumption might have been different had the distribution been originally appointed to take place at the death of a liferenter, yet the meaning of the word “survivors” is fixed by the immediate context to be persons *surviving the testator*, and there is nothing in the subsequent creation of a liferent interest to alter the meaning thus impressed upon it.

SECTION III.

LEGACIES GIVEN SUBJECT TO POWERS OF DISPOSAL OR DISTRIBUTION.

A power of disposal subsisting has the effect of rendering the fee contingent.

1439. To avoid repetition, reference is made to a subsequent chapter,(m) in which the constitution and mode of exercise of powers of this description is treated. We have there seen that a grant of a power of disposal, however general in its terms, does not, when it is followed by a destination over in default of the exercise of the power, vest the fee of the estate in the donee of the power. Such being the case, it is apparent that the vesting of the fee (which is conditional on the final exercise of the power) must remain in suspense during the lives of the granter of the power and of the donee. Such at least appears to be the necessary result, where a power of disposal is given to a liferenter to be exercised by will or testamentary disposition.(n) Where the power is a general one, and it is exercised by granting an irrevocable deed of appointment, the circumstance of the donee of the power being also a liferenter, will not prevent the acquisition of a vested interest by the fiar or appointee. A power of disposal, applicable to a part of a succession, would not be held to have the effect of postponing the vesting of the residue as to which no corresponding power is given.(o)

(l) 5 Macph. 156.

(m) Chapter 60.

(n) *Robertson v. Houston*, 28 May 1858,

20 D. 989; *Marder's Trs. v. Marder*, 30 March 1853, 15 D. 633.

(o) *Donaldson's Trs. v. Macdougall*, 20 July 1860, 22 D. 1527.

1440. It is elsewhere shown that, on the death of a liferenter to whom a power of disposal is given without executing the power, the estate does not accrue to his representatives, but to the residuary legatees or other representatives of the grantor of the power. (p) A grant of the liferent of a succession, even when coupled with a power of appropriating as much of the capital as may be necessary for the maintenance of the grantee, is not held to vest the fee in the person of the liferenter in a question between his representatives and those of the grantor; and the fund, so far as not appropriated or disposed of, will, on the death of the liferenter, revert to the heirs of his author. (q)

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Specialties in the case of powers of disposal granted to liferenters.

1441. It is settled by a considerable body of authority, that the existence of an unexercised power of distribution or division does not prevent the acquisition of a vested interest by the class of persons amongst whom the succession is to be distributed; (r) although, in such a case, the value of the several individual interests is affected by a double contingency; being dependent not only on the number of persons that may be comprehended in the class at some future time, but also on the manner in which the power of distribution may be exercised. It would also appear to be established that a power of selection of objects from an indefinite class of persons, may be competently exercised before the arrival of the prescribed period of distribution. (s) In such a case, the exercise of the power would confer a vested interest on the selected beneficiaries; but while the power remained dormant, the vesting of the subjected estate would obviously be suspended. (t)

Estate may vest in a class of persons notwithstanding the subsistence of a power of division.

SECTION IV.

DEFERRED LIFERENTS AND ANNUITIES.

1442. Liferent interests, which in the nature of things are purely personal rights, contingent on the survivance of the beneficiary, and not admitting of descent or transmission to heirs, do not become vested in any sense until they vest in possession. (u) A contingent

Liferent interests vest only in possession.

(p) See chapter 60 (Powers of Disposal).

(q) *Sprot v. Pennycook*, 12 June 1855, 17 D. 840.(r) *Sivright v. Dallas*, 27 Jan. 1824, 2 Sh. 643, N. E. 543; *Cowan v. Crawford*, 20 Jan. 1837, 15 Sh. 899; *Watson v. Marjoribanks*, 17 Feb. 1837, 15 Sh. 587; *Baillie v. Seton* (Lord Rutherford's note), 16 D. 218; *Fyffe v. Fyffe*, 13 July 1841, 8 D. 1205;*Wood v. Wood*, 18 Jan. 1861, 28 D. 338; *Romanes v. Riddell*, 18 Jan. 1865, 8 Macph. 348.(s) *M'Cormack v. Barber*, 25 Jan. 1861, 28 D. 398.(t) See *Pursell v. Elder*, 24 March 1865, 8 Macph. H. L. 59.(u) *Findlay v. Macintyre*, 11 Dec. 1849, 12 D. 325.

CHAPTER XLIII. or deferred liferent does not vest until the event happens upon which it is conditioned to take effect. Accordingly, where successive liferents are carved out of the same estate, the right of the substituted liferenters only vests at the expiration of the prior usufructuary interests; and, where such rights are given to two or more persons jointly, the interest of the joint liferenter first deceasing enures to the benefit of the survivors or survivor. The principle is exemplified in the case of *Thom v. Thom*,^(x) where, by antenuptial contract of marriage, estate was disposed to the wife's father in liferent, and after his death to the spouses in conjunct fee and liferent, and to the survivor of them in liferent, for the husband's liferent use only; and the marriage was afterwards dissolved by a decree of divorce obtained at the instance of the husband. The Court, in the application of the rule of law that the rights of the party obtaining the decree of divorce are the same as in the case of a dissolution of the marriage by death, found that in this case the husband, upon the death of the wife's father, was entitled to the undivided usufruct of the settled estate.

Implied survivorship in joint liferent bequests.

1443. Where estate is granted to a plurality of persons in terms which import a joint destination, a right of survivorship is held to be implied in the grant, provided that the fee of the estate is given over as an entire subject; but where the subject of disposition is given to a class of persons in liferent, with remainder to their respective issue in fee, the construction clearly implies that the liferent interest is to be taken by the grantees in distinct shares, and that their issue are to come into possession of their respective interests in the property immediately on the death of their parents.^(y) Again, where estate is disposed or bequeathed to a plurality of persons in shares, that is in severalty, the deed or will, according to the established construction, will only vest a *pro indiviso* liferent interest in the subject in each of the grantees, determinable at his death. In the case of *Tulloch v. Welsh*, the question was as to the effect of a disposition to a brother and a sister in liferent, for their liferent use only, with a destination over in fee, and with this declaration, that the yearly rents and profits of the estate should be paid to the liferenters during their lives, share and share alike. It was held that a right of survivorship was given by implication, on the construction of certain expressions in the destination of the fee, showing that the fee was not intended to open until after the death of the longest liver of the liferenters.^(z) The cases to which refer-

^(x) *Thom v. Thom*, 11 June 1852, 14 D. 861.

^(y) *Donaldson's Trs. v. Cuthbertson*, 12 Jan. 1864, 2 Macph. 428, *Idem. nom. Mac-*

dougall v. Macdougall, 6 Feb. 1866, 4 Macph. 372; see judgment in H. L. 26 March 1868.

^(z) *Tulloch v. Welsh*, 23 Nov. 1838, 1 D. 94.

ence is made in the discussion of the general subject of the vesting of postponed interests, offer many examples of the limitation of successive liferents, and also of the constitution of joint liferents with a right of survivorship. (a)

1444. In the case of *Scott v. Scales*, (b) a question is presented as to the effect of an alteration by codicil of a destination in a will, which has some analogy to the case of *Nolan* already noticed. Here the testatrix, by one of her testamentary writings, provided a sum of money to a legatee, A., in liferent, and after the death of A. to her daughter B., also in liferent. By a subsequent testamentary writing she revoked the bequest in favour of A., but said nothing regarding the deferred liferent given to the daughter. The question was as to the destination of the income of the fund during the lifetime of A., whether it devolved to B., or fell into residue. It was held that B. took an immediate liferent, the judgment being rested upon the special circumstances of the case. (c)

Whether a deferred life-renter takes an immediate interest in consequence of the revocation of the antecedent life-rent gift.

1445. Where a usufructuary interest is given to one person for the life of another person, or until the occurrence of a specified event, it has been held that the interest vests in its entirety *a morte testatoris*, insomuch that if the legatee die before the event happens, his representatives are entitled to the income for the remainder of the term. (d)

Vesting of interests given for the life of another.

(a) *Johnston v. Johnston*, 9 June 1840, 2 D. 1038; *Maxwell v. Wylie*, 25 May 1837, 15 Sh. 1005; *Pursell v. Newbigging*, 15 D. 489, 10 May 1855, 2 Macq. 273; *Robertson v. Houston*, 28 May 1858, 20 D. 989.

first instituted predeceases the testator, it has been held in England, in conformity with the principle stated in the text, that the second liferenter takes an immediate vested interest; *re Betty Smith's Trusts*, Law Rep. 1 Eq. Ca. 79.

(b) *Scott v. Scales*, 20 July 1865, 8 Macph. 1180.

(d) *Hill v. Hill's Tutors*, 8 Nov. 1866, 5 Macph. 12.

(c) Where liferents are given to two legatees in succession, and the legatee

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PART VI.
ESTATES IN TRUST.

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OF TRUSTS, AND THE ESTATE OF A BENEFICIARY.

- I. *Definition and Classification of Trusts.*
- II. *Estate of the Trustee.*
III. *Estate of the Beneficiary.*

SECTION I.

DEFINITION AND CLASSIFICATION OF TRUSTS.

Trust defined by Craig.

1446. The earliest description of a trust by a Scotch jurist is that given by Craig in his chapter *de conditionibus in investituris*.(a) Viewing a trust as a burden upon feudal estate, he says: “Sunt et quædam conditiones, quæ neque dantis neque accipientis causâ fiunt, et multò minùs utriusque; veluti, si ita convenerit, ut ego tibi feudum concedam, eâ lege ut tu alii concedas, quod feudum recte fideicommissum dicitur.” This conception of a trust, which comes very near to the definition give by Lord Coke,(b) and adopted by modern writers on the law of England,(c) has not received much attention from our institutional writers, who are agreed in referring trusts to the civil law contracts of mandate and deposit, or to a combination of them.

Doctrine of the civil law.

1447. In the civil law trusts were not so regarded. *Fideicommissa* are classed in the Institutes as a distinct species of right, and take their place, not in the category of contracts, but in connection with inheritances, to which class of interests they appear naturally to belong.(d) It is true that the rights and liabilities of trustees

(a) Craig de Feudis, 2, 5, 9.

(b) Co. Lit. 272, b.

(c) Lewin on Trusts, 5th ed. p. 13.

(d) Inst. lib. 2, tit. 23 & 24.

are closely analogous in principle to those which arise out of the contract of mandate, while the obligation to restore the estate unimpaired, which is the peculiar duty of a depositary, is in like manner binding upon a trustee. Such resemblances are explained by a consideration of the properties of trust, which possesses, in common with the civil law contract of mandate, the character of a gratuitous function, to be exercised for the benefit of an appointee. As the duties of a trustee differ in many respects from those of a mandatory, we prefer to consider the threefold relation subsisting between the truster, the trustee, and the beneficiary, as a *quasi* contract, distinct from mandate, but closely allied to it.

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Trust viewed as a combination of mandate and deposit.

1448. "Trust," says Stair, "is also amongst mandates or commissions, though it may be referred to deposition, seeing the right is in custody of the person intrusted."(*e*) And in another place, "Trust is also a kind of deposition, whereby the thing intrusted is in the custody of the person intrusted to the behoof of the intruster; and the property of the thing intrusted, be it in land or moveables, is in the person of the intrusted, else it is not proper trust."(*f*) Erskine's definition is briefer and clearer:—"A trust," he says, "is also of the nature of deposition, by which a proprietor transfers to another the property of the subject intrusted, not that it should remain with him, but that it may be applied to certain uses for the behoof of a third party."(*g*) Professor Bell's definition, has mainly in view the relation subsisting between truster and trustee. He says, "In a deed of trust there is a combination of two contracts—deposit and mandate; the estate not being in the trustee for any use or purpose of his own, and the management being regulated by the directions given by the maker of the trust."(*h*) In the following definition, which we take from Pothier's "*Traité des Substitutions*," the interest of the beneficiary is brought more prominently into view:—"La substitution fideicommissaire est la disposition que je fais d'une chose au profit de quelqu'un, par le canal d'une personne interposée, que j'ai chargée de la lui remettre."

Definitions of Stair, Erskine, Bell, and Pothier.

1449. A trust, as we conceive, may be properly defined as an interest created by the conveyance of property to a trustee, in order that he may carry out the truster's directions respecting its management and disposal. This definition includes the two essentials of a trust, viz., the conveyance of property, and the creation of a trust purpose; and it may easily be shown that the other properties mentioned in the preceding definitions, and assumed to be charac-

Proposed definition.

(*e*) Stair, 1, 12, 17.(*g*) Ersk. 3, 1, 32.(*f*) Stair, 1, 13, 7.(*h*) Bell's Com. 841 (5th ed. 1, 31).

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teristic of trusts, are accidental. For example, it is by no means essential to a trust that it should be designed for the benefit of a third party. The beneficiary may, and in many cases is, no other than the truster himself. Nor is it necessary, as assumed by Pothier,⁽ⁱ⁾ that there should be an ultimate conveyance to some favoured person. The trust-estate may be entirely absorbed in the liquidation of debts, or it may be left to the trustees in perpetuity, in order that they may apply the revenues to charitable or other uses.

Separation of legal and beneficial estates essential to a trust.

1450. It is clear, however, that a trust can only exist for the benefit of some other person than the trustee. A conveyance to a party in trust for himself, is just a conveyance in fee-simple; and the same result follows when the legal and beneficial interests happen to merge in the same person.^(k) In England, where the right of the beneficiary is regarded as a special property, the union of the two estates is effected by the aid of the legal doctrine of "merger,"—the lesser right being absorbed in the greater. In Scotland (where the interest of the beneficiary is of the nature of a right of action arising from obligation), the union of the two interests in one person may be described as an extinction of the trustee's obligation *confusione*.

Incidents of a trust: purposes and conveyance.

1451. It is by the existence of trust purposes in connection with a conveyance of property that we are enabled to distinguish trusts from the other legal rights to which they are nearly allied. Thus, the fact that an estate is *conveyed* to the trustee, serves to distinguish the relation of trust from that of factory and commission; for though the purposes of a factory may be similar, and the powers of the commissioner as regards disposing, etc., equally extensive, yet the property of the estate is not vested in the person of the factor. On the other hand, a trust is distinguished from a mere deposit by the nature of the duties devolving upon the trustee, which are not, as in the case of a depositary, limited to the safe keeping and restoration of the subject, but embrace almost all the powers and responsibilities of ownership.

Trust in Scotland not annexed to the person.

1452. From the union of the functions of mandatory and depositary in the person of the trustee, there arise certain important properties of trusts which cannot be referred to either mandate or deposit separately. Chief in importance amongst these, is the rule, that personal trusts are binding upon strangers. Another distinguishing feature of trusts is, the peculiar tenure of the legal estate, which in Scotland is annexed not to the person but to the office of

(i) Poth., ed. Dupin, 7, tom. p. 547.

(k) Inst. lib. 8, tit. 27 (*de Mandato*).

the trustee; insomuch that, although during the continuance of the office the trustee's title is complete, leaving only a bare right of action in the beneficiary, yet that property title neither transmits to the heirs of the trustee, unless specially called by the destination, nor to his representatives in bankruptcy. So also, in the event of a total failure of the trustees, the trust is said to lapse, and the title remains in suspense until it is adjudged by the party beneficially interested, or is vested in a factor by warrant of a judge of the Court of Session.

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1453. The most general division of trusts is into Simple and Special. A simple trust has been defined as a conveyance of property to one person upon trust for another; in which case, the nature of the trust, not being qualified by the settlor, is left to the operation of law.^(l) In this case, the trust is held to be executed as soon as the trustee has made up a title to the property; and the beneficiary has then the right to call upon the trustee to denude, either in favour of the beneficiary himself, or of any other person he may appoint. As an example of a *simple* trust, we may mention trusts of heritable property for behoof of a partnership or joint-stock company. A special trust may be resolved into a simple in consequence of the impossibility of executing the special purpose; as where trustees are directed to hold land for behoof of A. in liferent and B. in fee, and A. predeceases the testator. The estate is then a simple trust for B. and his heirs. A *special* trust is constituted, where the aid of a trustee is sought for the execution of a specified purpose. It is only in the special trust that the trustee can be said to exercise the functions of a mandatory; and in the execution of such trusts the duties of the trustee may vary to any extent compatible with the nature of the subject, and the scope of the truster's intention.

Trusts divided into simple and special.
Definition of a simple trust.

Special trusts.

1454. Special trusts have been subdivided into *ministerial* (or *administrative*) and *discretionary*. The former, being such as any intelligent and skilful person is presumed to be capable of performing, may be executed by the Court through the instrumentality of a factor. Discretionary trusts are those, the administration of which depends to a certain extent upon the will of the trustee, guided by discretion and his knowledge of the circumstances of the beneficiaries; as in the case of a trust for apportioning a fund amongst children. Such trusts partake of the nature of powers; and are presumed to be conferred upon the trustee from the confidence which the testator reposes in his discretion. They are, therefore, strictly personal to the trustee. And while the exercise of a discre-

Trusts ministerial and discretionary.

(l) Lewin on Trusts, 5th ed. p. 17.

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tionary trust is imperative on the trustee if he accepts the trust; yet, if he declines to accept, or dies without executing it, the trust cannot be carried into effect by the Court. (m)

Public trusts.

1455. An important division of trusts is that of *public* and *private*. *Public trusts* are defined by Lewin (n) to be "such as are constituted for the benefit either of the public at large, or of some considerable portion of it, answering a particular description." From the number and importance of the trusts created in modern times by Parliamentary authority, the decisions relative to trusts of this description are not to be wholly overlooked in a treatise on trust law. It may be observed, however, that the duties of such trustees are, for the most part, either such as are common to all fiduciary persons, or they are of such a strictly local and personal character as to be useless for precedents in other cases. On this account we have not thought it necessary to treat separately of Parliamentary trusts. The duties of trustees for charitable purposes (another branch of public trusts) will be specially considered.

Trusts arising by operation of law.

1456. The last division to which we shall allude, is that into trusts *constituted by the act of a party*, and trusts *by operation of law*. The first class includes not only written trusts, express and implied, but also such latent trusts as are constituted by verbal agreement, without back-bond or written acknowledgment, and which, according to the Scottish Statute, (o) can only be proved by the oath of the trustee. The second class comprehends resulting trusts, where the title to property happens to be separated from the beneficial ownership without any intention of creating a special trust; and constructive trusts, which is merely another name for the duty of restitution, which may be enforced against a party acquiring property by an illegal title.

SECTION II.

ESTATE OF THE TRUSTEE.

Estate of a trustee is an estate in fee, qualified by the conditions of the grant.

1457. The first point to be considered is the quality of the estate vested in the trustee under an express trust of heritable or moveable property; that is, where the conveyance itself bears to be in trust for purposes either embodied in the deed or to be afterwards declared. The trust-estate is then of the nature of a limited fee; the limitations being determined by the nature of the trust purposes, which are binding as *conditions of the grant* upon the trustees and

(m) See *Nisbet v. Tod*, 15 Jan. 1848, 10 D. 861.

(n) Lewin on Trusts, 5th ed. p. 19.

(o) Stat. 1696, c. 25.

all others into whose hands the estate may pass. If the ultimate purpose of the trust is a conveyance of the estate to the beneficiary with all its legal properties, these properties in the meantime are vested in the person of the trustee; if the purpose is a reconveyance to the granter, the fee is held to remain with him, and the trust is merely a burden. (p)

1458. The nature of the legal estate in the trustee is well characterised by Prof. Bell in his "Principles," in which the constitution of the fiduciary relation is shown to be dependent on the following principles:—"1. That a full legal estate is created in the person of the trustee, to be held by him against all adverse parties and interests, for the accomplishment of certain ends and purposes. 2. That the uses and purposes of the trust operate as qualifications of the estate in the trustee, and as burdens on it, preferable to all who may claim through him. 3. That those purposes and uses are effectually declared by directions in the deed, or by a reservation of power to declare in future, and a declaration made accordingly. And 4. That the reversionary right, so far as the estate is not exhausted by the uses and purposes, remains with the truster, available to him, his heirs, and creditors." (q)

Nature of the trustee's estate stated by Bell.

1459. The creditors of a bankrupt trustee, who has kept the trust-estate distinct from his own funds, can have no claim upon the trust-estate; nor does the trust-estate become vested even nominally in the trustee under a sequestration. But if a trustee becomes bankrupt while in the possession of trust-funds not distinguishable from his own, his constituents can only claim a dividend. (r) By § 102 of the Bankruptcy Act, the vesting of the bankrupt's moveable estate in the trustee is expressly limited to such estate and effects, "so far as attachable for debt," (s)—an expression which excludes property held in trust; and with regard to heritable property it is provided, that "if any part of the bankrupt's estate be held under an entail, or by a title otherwise limited, the right vested in the trustee shall be effectual only to the extent of the interest in the estate which the bankrupt might legally convey, or the creditors attach." The qualification applies not only to express trustees, but to judicial factors, tutors, and other persons in whom property is vested for behoof of others.

Creditors of the trustee take no interest in the trust-estate under the Bankruptcy Act.

1460. The vesting clause of the English bankruptcy statute carries property situated in Scotland; but it, also, is so confined in its

Idem, as to English Bankruptcy Act.

(p) See chapter 45 (Doctrine of Radical Right).

(q) Bell's Pr. § 1991.

(r) *Leck v. Gairdner*, 7 July 1855, 17 D.

1075. See remarks on the effect of trustees investing the trust-money in trade, *infra*, § 1462.

(s) 19 & 20 Vict. c. 79, § 102.

CHAPTER XLIV. application as not to include estate held by the bankrupt in trust.

Creditors are entitled, where trustee has also the beneficial interest.

Under this Statute nothing vests in the assignees, even at law, but such real and personal estate of the bankrupt in which he had the equitable as well as the legal interest, and which is to be applied to the payment of the bankrupt's debts. (y) If an insolvent trustee has both a fiduciary and a beneficial interest in property legally vested in him, it would appear, on the authority of the English cases, that the property passes to the assignees in bankruptcy, who take as trustees for the creditors and others interested. (z) According to Mr Lewin, this rule would not apply to the case of a party expressly nominated a trustee, and who may have some partial beneficial interest in the trust.

Estate in trust carries with it all personal rights and privileges.

1461. Where the possession of estate confers any special right or privilege, it would seem that the trustee of the estate may exercise it, unless debarred by statute. Thus it has been held in England that a trustee might present to a benefice, though he would be bound in equity to observe the directions of the beneficiary. (a) A trustee of stock in a public company is entitled to vote as a proprietor, and may even hold the office of director, if elected. A trustee is of course entitled to vote as a creditor on the sequestrated estates of a debtor to the trust; and it has been decided that he may exercise this right before confirmation. (b) A trustee of heritage has, at common law, the right of entering vassals; and the rule extends to trustees for payment of debts, even where the radical right is held to remain with the truster. (c) It would rather appear that, at common law, a trustee holding a freehold qualification was entitled to vote in the election of a commissioner for the shire. But by 12 Anne, stat. 1, cap. 6, electors were entitled to tender to any person claiming to vote, an oath called "the oath of trust;" and unless the voter was able to swear that he did not hold the property in trust for another, he was disqualified from voting in the election. (d) By the existing Reform Act a form of oath is prescribed, which may be tendered to voters at any election for a member of Parliament in Scotland, and by which the deponent must state that he holds the property in question "for my own benefit, and not in trust for, or at the pleasure of, any other person." (e)

Parliamentary elections.

Effect of mixing trust-money with trustee's private means.

1462. If the trustee has improperly used the trust-estate as his own—as, for example, by investing the capital of the trust-funds in

(y) *Scott v. Surman*, Willes, 402; Lewin on Trusts, 5th ed. 193.

(z) Lewin, 5th ed. 195.

(a) Lewin, 5th ed. 291.

(b) *Chalmers' Trs. v. Watson*, 12 May 1860, 22 D. 1060.

(c) *Ker v. Russell*, 7 Dec. 1838, 1 D. 179.

(d) 12 Anne, stat. 1, cap. 6. It is unnecessary to refer here to recent legislation on this subject.

(e) 2 & 3 Will. IV., cap. 65.

his business—it would appear that any fund remaining at his credit would belong to his creditors generally, there being no rule of law under which the beneficiaries could lay claim to a preference over trust-money so invested. Trustees employing the trust-funds in speculations, or keeping the money in their own hands, are guilty of a breach of trust;(f) and the possibility of the property being thus entirely lost to the beneficiaries was the main reason which induced the Court, in *Cochrane v. Black*, to find the trustees liable to account to the beneficiaries for the profits which they had realized through the employment of the trust-funds in trade.(g)

1463. A trust-disposition of lands for behoof of creditors, with a power of sale, subject to an obligation on the trustee to reconvey, does not, even when followed by infeftment, divest the granter of his *radical right* to the estate. The truster, on the contrary, retains a real right in the estate so far as unsold,—a right which may be adjudged by non-acceding creditors,(h) and in virtue of which the truster may sell the lands, although the trustee should refuse to concur,(i) or may even execute an effectual entail of the estate before it is reconveyed to him.(k) In the case of heritable property, there is a difficulty in recognising the existence of a real right in the truster, where the disposition is *ex facie* an absolute conveyance, and no back-bond has been recorded. Accordingly, it has been laid down, that a trust constituted by unrecorded back-bond from the disponent creates only a personal obligation to reconvey.(l) It is clear that the assignee of the trustee would have a preferable right to the assignee of the truster, if his infeftment were first in order of time.(m) If the truster's assignee were first seised, the question whether his infeftment would give him a preference, depends on the view that may be taken of the nature of the grantor's title. If, as Lord Fullerton considered, the effect of an *ex facie* absolute conveyance is entirely to divest the granter, leaving him only a *jus crediti*, then the assignees could only acquire a preference by adjudging from the trustee. The recording of a back-bond of

Truster's radical right may be made effectual to creditors in bankruptcy.

(f) *Cochrane v. Black*, 1 Feb. 1855, 17 D. 321.

(g) *Cochrane v. Black*, 16 July 1857, 19 D. 1019. See chapter 63, section 4.

(h) *Campbell v. Edderline's Crs.*, 14 Jan. 1801, M. "Adjudication," App. No. 11.

(i) *Brisbane's Trs. v. Crawford*, 3 Feb. 1826, 4 Sh. 422, N. E. 427.

(k) *M'Millan, etc. v. Campbell*, 9 Sh. 551; affirmed 14 Aug. 1834, 7 W. & S. 441; *M'Leod v. M'Kenzie*, 17 Nov. 1827, 6 Sh.

77; *Melville v. Preston*, 8 Feb. 1888, 16 Sh. 457.

(l) *Robertson v. Duff*, 14 Jan. 1840, 2 D. 279, per Lord Fullerton, p. 291.

(m) *Somervail v. Redfearn*, 1 June 1813, 5 Paton, 707, 1 Dow, 50; *Burns v. Laurie's Trs.*, 7 July 1840, 2 D. 1348. But the purchaser's infeftment is no protection if he was cognisant of the trust; *Lang v. Mags. of Dumbarton*, 29 June 1813, F.C. See section 3, *infra*.

CHAPTER XLIV. trust would seem not to have the effect of reinstating the granter in his radical right. (n)

SECTION III.

ESTATE OF THE BENEFICIARY.

Beneficial or equitable estate is a right of property, and not merely a *jus crediti*.

1464. The distinction between the specific property or interest which forms the subject of conveyance in a deed of trust, and the beneficiary's right to that property or interest, is a very obvious one; and yet, from inattention to this distinction, the real nature of the beneficiary's right to the trust-estate has either been misunderstood, or imperfectly stated, by the authorities in the jurisprudence of Scotland who have professed to deal with the question. (o) The beneficial interest has been defined as a *jus crediti* affecting the trustee; a definition which, if accurate at all, is only accurate when applied to the case of a beneficial interest arising under an *ex facie* absolute disposition, qualified by a separate declaration. The beneficial interest under deeds of settlement, conveying the estate ostensibly for uses and purposes, may be more correctly defined as a personal right of property in the estate which is the subject of disposition. It is a right of property in the same sense that a ground-annual, real burden, or other right by reservation, or an estate standing upon a decree or minute of sale, is a right of property. For although the *title* to the estate stands in the person of the trustee, the *interest* of the beneficiary is by the terms of the trust-deed protected, in so far as the nature of the property in each particular case admits of protection, against the acts of the trustee and the claims of his creditors.

Equitable estate defined by Lord Westbury.

1465. Referring to the distinction which has been taken be-

(n) See opinions in *Gardyne v. Royal Bank*, 13 D. 918, which are not affected by the reversal, 1 Macq. 858. This subject is more fully considered in chapter 45.

(o) For example, Mr Forsyth designates the interest of the beneficiary as "an assignable or disposable personal right or *jus crediti*" (Forsyth on Trusts, 329),—a definition which, although correct so far as it goes, does not sufficiently mark the distinguishing property of the beneficial interest as creating a nexus over the trust-estate. Professor Bell's definition, according to which the beneficial interest "gives only a *jus crediti* or personal action against the trustee, to execute the trust or to denude" (Com. 858, 5th ed. i, 37), is

liable to the same criticism; though he elsewhere explains that the declaration of trust creates a real burden on the fee vested in the trustee. The observations of Lord Cranworth in *Edmond v. Gordon*, 26 Feb. 1828, 3 Macq. 122, as to the obscurity which pervades the distinction,—or rather the want of distinction,—between *jus ad rem* and *jus crediti* in the writings of Scotch legists, appear to be well founded; but unfortunately his Lordship's attempted distinction only makes the confusion worse. It is hoped that the analysis in the text (which, but for the confusion complained of, might seem needlessly minute) may help to elucidate the matter.

tween the *jus crediti* of a beneficiary under a trust-settlement and the estate itself, in regard to questions of succession and the mode of transmission, Lord Chancellor Westbury observed, in a recent case, "It is a distinction in name, and not in fact, for the *jus crediti* is no more than another denomination of what may be called the estate of a beneficiary, or an *equitable estate*; and it receives that title only when it is regarded under the aspect of the right which the beneficiary has to call upon the trustees to convey, to transfer, or to denude themselves of the possession of the subject."(*p*)

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1466. The beneficiary, it is obvious, can in no case have a title of a higher quality than that which has been granted to the trustee. If, for example, the trust-estate consist of a right in the nature of a liquid debt,—*e.g.*, a right to the sum in a personal bond, bill of exchange, or policy of insurance, after the obligation has fallen due,—the right of the trustee is but a *jus crediti*, and the beneficiary who claims through him can have no higher title. The trustee, as creditor in the legal obligation, may uplift the contents; and if he misappropriate the money, the beneficiary has no remedy except by a personal action against the trustee. Even in the case of moveable rights which are not immediately prestable, the legal character of the beneficiary's interest is similar to that of the trustee; but it is liable to be defeated through the exercise of the power, which the trustee possesses at common law, of assigning and changing the securities of the personal estate conveyed to him. But this power may, in certain cases, be withheld.

Equitable estate in personal property is a real and preferable right;

1467. If, for example, the truster qualify a trust-disposition of government stock, bonds, shares, or the like, by an express direction to convey the subject specifically to a certain beneficiary, it is obvious that the beneficiary, although not the titular proprietor, has a right of property in the subject of conveyance, which he may vindicate in competition with onerous assignees of the trustee, on the principle that the title of the latter was qualified by the purpose of specific conveyance. This illustration, when compared with the case of the beneficiary's right to a heritable bond destined specifically to his use, may serve to establish the proposition that there is no difference between the nature of the beneficiary's interest in heritable and moveable property. In the case of the heritable bond, the beneficiary's right, being a personal right to heritable estate, might at first be supposed to carry with it a higher degree of security; but the truth is, that in both cases the beneficiary's right is a personal right of property in the subject, which he may enforce,

but defeasible by assignment of the estate.

(*p*) *Buchanan v. Angus*, 15 May 1862, 4 Macq. 374.

CHAPTER XLIV. first, by preventing the trustee from assigning to another, and secondly, by compelling the trustee to assign to himself.

Nature of the beneficial or equitable estate in heritable property.

Effect of power of sale.

1468. Again, while the beneficiary's right to feudal subjects in a question with third parties is that which the trustee's title is capable of conferring, his equitable interest—in other words, the security which the trust-deed gives him against the fraudulent acts of the trustee—is in no degree connected with the nature of the trustee's title, but depends solely on the form of the trust. Where the purposes are embodied or referred to in the deed of conveyance, purchasers from a trustee selling without authority will be liable to the beneficiary in the same manner as the trustee himself would be liable. (q) A power of sale does, of course, very much impair the beneficiary's security against the voluntary acts of the trustee; but it cannot alter the nature of his interest as a right of property. By the exercise of this power, the beneficiary loses the means of enforcing his right *in rem*, and his right is converted into a claim to the proceeds of the converted estate. But while the estate remains unsold, his interest in the specific estate remains to him, and is effectual in bankruptcy, as a right of property in the estate, and not merely as a *jus crediti* (which would only entitle him to rank for a dividend). A power of sale, therefore, while it impairs the beneficiary's security against fraud, does not alter the nature of his proprietary right, or "equitable estate." He is in this respect in no worse position than that of a fee-simple proprietor possessing on a personal title, who has granted a power of sale to a commissioner.

Beneficial estate under an *ex facie* absolute disposition.

In case of property held personal, it is *jus ad rem*. In case of feudal estate, it is *jus crediti* simply.

1469. The beneficiary's right to estate conveyed under an *ex facie* absolute disposition, is also a personal right of property, with this difference, that as his interest has not been made a burden upon the trustee's title, it is not a *jus in re* enforceable against onerous assignees of the trustee. (r) It is, however, a personal right of property—*jus ad rem*—giving the beneficiary a preference in bankruptcy, (s) and in questions with adjudgers from the trustee. (t) It is to be observed, however, that there is no such title known in law as a personal right qualifying a feudal estate; and therefore, if a trustee, clothed with an *ex facie* absolute title, take infeftment on

(q) On the same principle, the right of the beneficiary is preferable to that of creditors adjudging, or in bankruptcy, from the trustee after infeftment, when the purposes are embodied in the disposition; *Macdowal v. Russell*, 6 Feb. 1824, F.C., and 2 Sh. 682, N. E. 574.

(r) *Redfearn v. Somervilles*, 1 June 1813, 5 Pat. 707, 1 Dow 50; M. "Personal and Real," App. No. 3; *Burns v. Laurie's Trs.*, 7

July 1840, 2 D. 1848; and see *Chalmers v. Mackenzie's Crs. (Redcastle)*, 1 June 1795, 3 Pat. 417; *Allan v. Robertson*, M. 10,265, 15 May 1781, 2 Pat. 572.

(s) *Gordon v. Cheyne*, 5 Feb. 1824, F.C.; *Dingwall v. M'Combie*, 6 June 1822, 1 Sh. 463, N. E. 431.

(t) *Preston v. Earl of Dundonald's Crs.*, 1805; M. "Personal and Real," App. No. 2.

the estate, the beneficiary loses his personal title, and retains only a *jus crediti* or right of action against the trustee, whether that consist in a right to a share of succession, or to a specific conveyance. Adjudgers and creditors in bankruptcy have, in such a case, the same rights as purchasers for a valuable consideration.^(u) CHAPTER XLIV.

1470. It was at one time attempted to be maintained, that as the beneficiary had no direct title to the trust-estate, the refusal of the trustees of the settlement to accept while the vesting of the beneficial interest remained in suspense, would defeat the trust. But this view was clearly irreconcilable with the true theory of the beneficiary's interest as a proprietary right; and accordingly it was found, in *Fraser v. Fraser*,^(x) that the beneficiary was entitled to have his interest protected by declarator, in a question with a party who had served heir to the truster. In *Gordon's Trs. v. Harper*,^(y) it was contended that the assignee of a conditional institute, whose right under the trust destination was contingent upon certain events, could not call upon the trustee to denude in his favour unless his cedent had previously made up a title by service. But the Court, after a hearing in presence, came to be unanimously of opinion, that as the right of the institute was constituted by the trust-disposition, service was unnecessary, and that assignation in any habile form was effectual to vest the right in the assignee. It would seem that if a party, erroneously believing himself to be in the possession of the full legal title to the estate, execute a conveyance of it in the dispositive form, the disposition will be effectual as an assignation of his beneficial interest under a trust-settlement.^(z) The subject of the assignation of beneficial interests, as well as their transmission by legal descent, will be afterwards considered in treating of those interests as the subject of transmission.

Beneficial estate not defeasible by refusal of the trustee to accept.

Gordon's Trs. v. Harper.

1471. When the legal and equitable estates are united in one person, the latter is *eo ipso* extinguished, as a party cannot have an equitable claim upon himself. This doctrine, which in the law of England is termed "merger," and in Scotland is described by the civil law term, "confusion,"^(a) seems to have place only where the entirety of both estates passes to the same person; for if a trustee

Extinction of the beneficial estate by confusion or merger.

^(u) *Calder v. Stewart*, 18 Nov. 1806, Hume, 440; see Baron Hume's note, and case of *Campbell v. Campbell*, 12 Feb. 1811, cited p. 444.

^(x) *Fraser v. Fraser*, 2 Feb. 1810, Hume, 885.

^(y) *Gordon's Trs. v. Harper*, 4 Dec. 1821, 1 Sh. 185. N.E. 175. See *Stainton v. Stainton's Trs.*, 25 Jan. 1850, 12 D. 571.

^(z) *Paul v. Boyd's Trs.*, 22 May 1835, 18 Sh. 818.

^(a) The principle of merger is identical with that of extinction *confusione*, as may be seen by comparing Mr Lewin's statement of the doctrine (chapter 24, section 4) with the text of the civil law, Dig. lib. 46, tit. 3, fr. 75.

CHAPTER XLIV. take only a partial beneficial interest in a trust, *e.g.*, a legacy, his unqualified interest in the legacy will not merge in his qualified title as trustee of the estate. (b)

By means of conveyance to a trustee opposing rights may be prevented from merging.

1472. Again, a trust may be employed as a means of separating the titles of two interests in the same subject, which, if allowed to remain in the person of the same proprietor, would merge. For example, an heir of entail who has paid off bonds affecting the estate, may assign them to a trustee to be held by him as a security, or subject to the purposes of the truster's testamentary dispositions. In this case, although the two rights have actually met in the same person, yet the subsequent assignation of the bond is sufficient evidence of the intention to keep up the debt; and the union of the rights by confusion, which is itself the creature of implied intention, cannot be inferred, in contradiction to the evidence of intention arising from the acts of the party. (c)

Interests of debtor and creditor do not merge when acquired by a trustee.

1473. Another example of the union of the equitable and legal titles arises where a trustee for creditors pays off heritable debts and takes an assignation to the securities in his own name. In this case there is no merger of the debt in the general estate; and therefore, if the trustee pay off a first heritable security, and afterwards assign the bond as a collateral security for a trust debt, a postponed creditor in a bond prior to the assignment cannot plead confusion, so as to deprive the assignee of the benefit of his preference. (d) Lord Cottenham observed, that if the *owner* of the estate had paid off the debts and taken the assignment for his own benefit, a question of novelty would have arisen as respects the law of Scotland, though it was clear that, according to the English precedents, the debt would be held to be extinguished. (e)

Beneficial usufruct, or estate in life.

1474. The creation of a continuing trust is frequently necessary for the accomplishment of purposes of a testamentary character, such as the securing of annuities and life interests. In other cases, the object of the trust is to provide for the payment of debts, or the liquidation of burdens, out of the revenues of the estate, without diminishing the capital. In this class of trusts the equitable estate may very frequently be resolved into two separate interests; first, an interest given to one party in the present possession of the

(b) See *Mackenzie v. Gordon*, *infra*; *Telford v. Jamieson*, 12 May 1835, 13 Sh. 735.

(c) See *Welsh v. Barstow*, 11 Feb. 1837, 15 Sh. 537.

(d) *Mackenzie v. Gordon*, 26 March 1839, M.L. and Rob. 117; affirming 16 Sh. 311.

(e) M.L. and Rob. 123-4. In England, however, it must be observed that more weight is given to the element of intention

than we should be disposed to allow in this country, in a question as to the title to heritable property. The rules to which we refer appear to us to be too conventional to be much relied upon as safe guides in our practice; and further than by a simple reference to Mr Lewin's work (*Lewin on Trusts*, 5th ed. p. 516), we do not think it necessary to trace them.

annual profits of the estate ; and, secondly, a reversionary interest in the capital or fee. CHAPTER XLIV.

1475. It may be laid down as a general rule, that a conveyance of heritable estate for the liferent use of a beneficiary will, unless the trust contemplates the profitable management of the estate by the trustees, and the payment of the surplus in the form of money, entitle the beneficiary to the enjoyment of the estate, and to the exercise of the beneficial rights of a usufructuary proprietor ; subject to this qualification,—that as the title to the estate, including the liferent as well as the fee, remains in the persons of the trustees, the beneficiary cannot exercise the functions of a legal proprietor except through the intervention of the trustees. A beneficial liferenter cannot put an end to the trust, either directly or by adjudging the liferent use, without the consent of the fiar ; for the trustees are entitled to retain the title and the legal possession, in order to the preservation of the reversionary interest.

In what cases the beneficiary of liferent estate has the right of possession.

1476. A liferenter of the beneficial interest in heritable subjects is entitled to the occupation of the mansion-house and grounds, and to the enjoyment of all the personal rights and privileges of a proprietor. (f) But in the granting of leases, the working of minerals, and other acts of profitable administration, he must act through the trustee, who will be bound to give effect to the views of his constituent, in so far as they are not injurious to the reversionary estate.

1477. The interests of liferenters and fiars of moveable funds, specifically destined, are similar in their reciprocal relations to those of heritable proprietors ; though, from the more simple quality of moveable interests, few questions can arise in regard to the management. The duty of the trustee is to retain the control of the fund, and to pay over the accruing interest as it arises. An extraordinary dividend or bonus falls to be added to capital, the liferenter being only entitled to the interest of it during his life. (g) It would seem that a liferent annuitant is not bound to accept an

Right of a beneficial or equitable liferenter of moveable property.

(f) It has been held in England that a trustee cannot appropriate the shootings to his own use ; *Webb v. Earl of Shaftesbury*, 7 Ves. 488 ; *Hutchinson v. Merrit*, 8 Y. & C. 547. In *Condie v. Macdonald* the Court refused to find a judicial factor liable for the rents of unlet shootings, on the ground, we presume, that they were reserved for the personal use of the beneficiary ; 20 Nov. 1884, 18 Sh. 61 ; see Lord Fullerton's note, 65. The beneficiary is also entitled to exercise the right of presenting to a benefice ; *Grindlay v. Drysdale*, 4 July

1883, 11 Sh. 896 ; Lewin on Trusts, 5th ed. p. 226 ; and cases cited *infra*, chap. 54, sect. 1.

(g) *Irving v. Houstoun*, 27 July 1808, 4 Paton, 521 ; reported as *Rollo v. Irving* in M. 8282. A limited fiar, holding the fund under an obligation not to dispoise or alter the destination gratuitously, is entitled to the capital of a bonus or extraordinary dividend ; *Cumming v. Cumming's Trs.*, 26 Feb. 1824, 2 Sh. 743, N.E. 620 ; see chap. 22, sect. 2.

CHAPTER XLIV. annuity heritably secured, but may insist on having a capital sum invested, yielding interest equal to the annuity.(h)

Right of the
beneficiary of a
reversionary
interest.

1478. As the beneficial interest of a *fiar* emerges only on the expiration of the *liferent* or usufructuary interest, his powers, during the subsistence of the trust, extend no further than to the protection of his reversionary estate. Where a change in the management is necessary, the intervention of the Court may be sought, in the form of an application for sequestration, or for the appointment of a judicial factor on the estate; (i) or, where the circumstances require it, by an application for interdict.

(h) *Wilson v. Beveridge*, 31 Jan. 1833, 11 Sh. 343. See *Forsyth v. Kilgour*, 15 Dec. 1854, 17 D. 208; *Davidson v. Dobie*, 13 Feb. 1828, 6 Sh. 536; *Grieve's Tr. v. Bethune*, 9 June 1830, 8 Sh. 896.

(i) In *Fraser v. Thorburn*, the Court awarded sequestration of an heritable trust estate at the instance of a beneficiary; 15

Dec. 1855, 18 D. 264. But in a later case, where the trust was constituted by an *ex facie* absolute disposition, sequestration of the heritable estate was refused, on the ground that the trust was truly a security transaction; *Viscountess Hawarden v. Dunlop*, 31 May 1861, 23 D. 923.

CHAPTER XLV.

DOCTRINE OF RADICAL RIGHT.

1479. We have already had occasion to refer more than once to a distinction of great practical importance in connection with the law of property, which obtains between trust-settlements which dispose of the entire interest of the grantor in his estate, and those which are constituted for special and temporary purposes, *e.g.*, for the economical management of the trustor's property, for the purpose of creating a security, or for the payment of debts. (a) The distinction, in regard to the character of the rights created by those two classes of trusts, will be better understood when the reader has considered, as we now propose to do, the important consequences which flow from the recognition of the doctrine of the trustor's radical or reversionary interest in property which is the subject of disposal under trusts for special and limited purposes.

Trusts which burden the interest of the trustor distinguished from those which divest him.

1480. The principle of the distinction to which we refer may be thus stated. A trust-conveyance, being in its own nature but a limited title, does not necessarily import that the trustor is divested of the fee or radical title to his property, any more than a disposition in security will import such a divestiture. In both cases, the whole estate is *ex figura verborum* conveyed from the grantor to the grantee. In the case of heritable securities, the force of the dispositive words is controlled by the conditions of the instrument by which the grantor's right of redemption is secured; the grantee's interest being limited, in any event, to the value of his debt. In this case, the radical title to the property clearly remains with the grantor, even though the estate may be mortgaged to an extent exceeding its actual value. It so remains, because the conveyance is qualified in such a manner as to leave a reversionary interest in the grantor. For the same reason, a conveyance to a donee *in trust*, with an ultimate purpose of reinstating the grantor in his

Unless the purposes of a trust exhaust the estate, *prima facie* it is merely a burden, and the trustor retains the radical title.

Analogy between trusts and heritable securities in relation to radical title.

(a) See the principle stated with reference to the title and estate of the trustee, chap. 44, sect. 2.

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property, does not divest him. The difference between the two cases amounts to this, and no more, that under a security title the grantee holds the estate for the purpose of satisfying liabilities incurred by the grantor to the grantee himself; under a trust-disposition in the form we are considering, the grantee holds the estate for the liquidation of liabilities incurred to third parties. In neither case is there any purpose of parting with the property further than may be needed to constitute a security; and accordingly, in regard to both, the theory of the law is that a conveyance so restricted is a mere burden, which may be extinguished by discharge, and during the subsistence of which the grantor is *in titulo* to deal with the estate in his character of heritable proprietor.

If the reversion is disposed of in the trust-deed, the radical title is held to be transferred.

1481. Where the primary purposes declared by a trust-disposition are the payment of debts and the economical management of the estate, and the ultimate purpose is, not the retrocession of the grantor, but the conveyance of the residuary estate to a third party, it would appear that the estate taken by the trustee is no longer a mere burden, but a trust of the fee. Here the radical interest is in the equitable disponee of the reversion, just as in the former case the radical interest was in the grantor, as being the party entitled to the surplus after fulfilment of the purposes. The chief distinction between the two cases has relation to the situation of the title of the estate. In the case of a conveyance to a trustee with an ultimate destination to the use of a stranger beneficiary, the full legal title to the estate passes from the truster to the trustee; whereas, in the case of a trust which contemplates the retrocession of the truster, no higher title passes to the trustee than is necessary for the execution of the special trusts with which he is clothed, and the radical title, as well as the radical right, remains in the truster.

Trusts which do not divest the grantor are operative as real securities.

1482. The position of a trustee under a trust which does not dispose of the reversionary interest, or disposes of it only by directing a reconveyance to the grantor, is not materially different from that of a factor holding a power of attorney as regards the relation subsisting between grantor and grantee. There is, however, a marked difference as regards the rights conferred upon the creditors. By means of a trust-conveyance a real security is constituted, giving the creditors for whose benefit the trust is created a preference in bankruptcy. This circumstance throws some light upon the nature of trusts for the payment of creditors, which may be defined as a species of real security combined with mandate. In the sequel of this chapter, and after noticing the leading cases upon the doctrine of the truster's radical title and interest, and certain modifications of that interest connected with special forms of disposition, we shall

consider more particularly, first, the powers of the truster during the subsistence of the trust and after its termination ; and secondly, the rights of his creditors. CHAPTER XLV.

1483. The first case demanding our attention is that of *Campbell v. Edderline's Crs.*, (b) in which the principle was established that where a truster retains the reversionary interest in the estate, the radical title will remain in his person, and that notwithstanding the execution of a formal dispositive conveyance to a trustee for the benefit of creditors, with an ulterior testamentary destination of the reversion. In this case, the truster's heritable estate was by the form of the settlement conveyed to trustees absolutely and irredeemably for behoof of the whole of his creditors. For this purpose the trustees were invested with powers of sale, and they were directed to entail the residue after payment of the truster's debts. The deed was declared irrevocable *until* the whole purposes of the trust should be fulfilled. After the truster's death, adjudications were led by several of his creditors proceeding upon charges against the heir-at-law. In a competition between those creditors and a creditor leading an adjudication against the trustee, it was maintained by the latter that the truster was completely divested of his lands by the trust-deed, and that the only regular adjudication was that which had been led against the trustee ; but the Court found that the proprietor was not completely divested of the real right and property of his estate by the trust right, and infeftment thereon, the same having been in trust for the granter's behoof, as the trustees " stood bound, in the event of a sale, to reconvey or settle the remainder for behoof of the granter and his heirs, which did not disable his lawful creditors, not acceding to the trust-deed, from doing diligence against himself while he lived, or against his apparent heir after his death, for payment or security of their debts." Powers of the truster. *Campbell v. Edderline's Crs.*
Held competent to adjudge reversion from the *hereditas* of the truster.

1484. The question, which had been considered by the profession to have been settled for more than thirty years, was again raised in the case of *M'Millan v. Campbell.* (c) In this case the truster, Mr Campbell, had executed a trust in favour of a trustee named in the settlement, whom failing, to such other person as might be appointed by his creditors, with power to dispose of the estate at his own discretion, and upon trust to pay all his (the truster's) debts, and thereafter to make payment to the truster, his heirs or assignees, of the residue of his funds, and also to reconvey the lands in case any part thereof should remain unsold. In terms of Truster possessing upon his radical title may create an entail of the legal estate. *M'Millan v. Campbell.*

(b) *Campbell v. Edderline's Crs.*, 14 Jan. 1801, M. "Adjudication," App. No. 11. 7 W. & S. 441, affirming 9 Sh. 551; *Fairlie v. Fergusson*, 11 July 1827, 5 Sh. 987,

(c) *M'Millan v. Campbell*, 14 Aug. 1884, N. E. 871.

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these instructions, a reconveyance was executed by the trustee in favour of the truster, who soon after executed an entail of the lands in the form of a procuratory of resignation. A reduction was afterwards brought by certain creditors of the entailer's son, who, founding upon a flaw in the title which the truster had obtained from his trustee, maintained that the trust-deed had completely divested the granter, and that at the time of executing the entail he was not vest and seised in the estate. The judgment of the Court of Session was, "That David Campbell, not having been divested by the trust-deed, had power to execute the procuratory of resignation containing the entail, and that the titles made up under it were validly and feudally made up." That judgment was affirmed by Lord Wynford, on the ground that the principle had been settled by decisions which had been generally approved by the profession.

Truster retaining the reversionary interest may, on fulfilling the trust purposes, require the trustee to discharge the trust.

Radical title may be transferred by a settlement of the reversion upon the granter's family.

1485. It is implied in the principle of those decisions, that the granter may recall or discharge a trust executed for behoof of his creditors, by paying or satisfying the liabilities which it was intended to secure. He cannot put an end to the security conferred on the acceding creditors except by satisfying their claims or obtaining a discharge of their interest; but, subject to their rights, he may dispose of the estate at pleasure.(d) The trustee's discharge is sufficient to put an end to the trust; and a reconveyance is unnecessary. Where, on the other hand, an irrevocable interest in the reversion is given to a third party, the granter is held to be completely divested, insomuch that, even though his liferent interest is reserved to him, he cannot rescind the trust, or require the trustees to reconvey to him. A familiar illustration of this principle is furnished by the case of marriage-contract trusts for behoof of the granter's family. It is obvious that in such a case the addition of a purpose of payment of debts would not alter the character of the settlement. It is not necessary that the deed should be onerous, to make it irrevocable; on the contrary, the cases cited in a former chapter(e) prove that a trust-conveyance for behoof of children may be made irrevocable by a declaration to that effect, and that by delivery the truster is completely divested, and loses all control over his property.(f)

Clanranald case.

1486. Both principles were involved in the leading case of *Herries, Farquhar, & Co. v. Brown*.(g) Mr Macdonald of Clanranald

(d) See *Herries, Farquhar, & Co. v. Brown*, 9 March 1888, 16 Sh. 948.

(e) Chapter 18, section 1.

(f) *Smitton v. Tod*, 12 Dec. 1889, 2 D. 225; *Turnbull v. Tawse*, 15 April 1825, 1 W. & S. 80, reversing 2 Sh. 1; *Wright v.*

Harley, 2 June 1847, 9 D. 1151; *MacGibbon v. MacGibbon*, 5 March 1852, 14 D. 605.

(g) *Herries, Farquhar, & Co. v. Brown*, 9 March 1888, 16 Sh. 948.

executed a trust-conveyance of his fee-simple estates, with powers of sale, for payment of debts then existing. The trustee was bound to reconvey the lands, so far as remaining unsold, or the reversion of the price, to the truster, or to any party named by him, on being "relieved of the whole engagements he may have come under in consequence hereof." On the occasion of the truster's marriage, a sum of £10,000 was paid to the trustee for the purposes of the trust, who thereupon consented to Mr Macdonald infesting himself and the heir-male of the marriage, and other heirs, under the conditions of a strict entail, "but subject to the trusts and purposes specified in the said trust-deed;" and the trustee further bound himself to denude on the expiration of the trust. In an action by subsequent creditors of the truster, which was referred to the whole Court, it was held by a majority of the judges (in conformity with the principles already laid down as to the grantor's reversionary interest), first, that the trustee was bound to denude in such manner as to secure the succession to the heirs of entail; and secondly, on the principle that an irrevocable interest was given to the heirs of the marriage, it was held that subsequent creditors were not entitled to do any diligence against the said lands, or the price thereof, so as to affect the rights of the heirs of the marriage.^(h) In the subsequent case of the *Globe Insurance Company v. Murray*,⁽ⁱ⁾ where the truster had executed an additional deed of trust on the occasion of his daughter's marriage, in which he adopted a previous settlement of his property in the form of a strict entail, and became a party to his daughter's contract of marriage, which conveyed the daughter's interest under the settlement and entail, it was held that the truster had not undertaken an onerous obligation with reference to his property, and was therefore not divested in such a way as to exclude the diligence of subsequent creditors. The consent given in this case to the daughter's conveyance of her interest, was obviously very different in its legal effect from the direct conveyance of the estate to the heirs of the marriage, which was the distinguishing feature of the *Clanranald* case.

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Trustee infest in security of advances, taken bound to convey to heirs of marriage on the expiration of the trust:

found, that the trustee was possessed of the reversionary estate for the benefit of the heir; and diligence of truster's creditors excluded.

1487. Although, as a general rule, a party can neither create a trust for his own behoof so as to exclude the diligence of his creditors,^(k) nor deprive himself of the power of revoking a deed in which he retains the sole beneficial interest,^(l) the rule has, from favour to married women, been so far relaxed, that a conveyance in

Torry Anderson's case. Marriage-contract trust for wife's separate use held irrevocable *stante matrimonio*.

(h) 16 Sh. 982.

(l) *Per curiam* in *Torry Anderson's case*,

(i) *Globe Ins. Co. v. Murray*, 15 Dec. 1854, 17 D. 216.

infra; *Murison v. Dick*, 10 Feb. 1854, 16 D. 529.

(k) *Earl of Rosebery v. Cowie*, 1 July 1823, 2 Sh. 443, N. E. 394.

CHAPTER XLV.

Effect of reserved power in marriage-contract trust to sell and re-invest, etc.

Trustee under an *ex facie* absolute conveyance has the radical title;

even where the purposes, as declared in a separate writing, do not exhaust the estate;

and although both titles are recorded.
Robertson v. Duff.

an antenuptial contract of the lady's property to trustees for her separate use, is irrevocable during the subsistence of the marriage ;(*m*) but the wife's radical title revives after the dissolution of the marriage, if she survive her husband. A marriage-contract may reserve power to the spouses, or to their trustees with their consent, to sell the property and reinvest the price ; in which case the power may be exercised by a judicial factor in case of the failure of the trustees.(*n*) Where, in a marriage-contract, a power was reserved to the spouses or the survivor of them to sell the wife's property, should they find it necessary for their support to do so, the wife's heir was held entitled to reduce a gratuitous conveyance by the husband.(*o*)

1488. What has been already said regarding the subsistence of the truster's title, notwithstanding the execution of a trust for payment of debts, must be understood to apply only to conveyances which are declared to be in trust *in gremio* of the deed of conveyance. With respect to unrecorded *ex facie* absolute conveyances, which are intended to operate as an indefinite security for advances, the truster is completely divested, his interest being reduced to a personal and contingent right to demand a reconveyance upon payment of all advances made subsequent to the disposition.(*p*) In a case of this nature, it was expressly laid down that the trustees had the radical right to the property.(*q*) And, even in those cases where the purposes of the trust, being of a more limited nature, are declared in a separate writing, there can no longer be any doubt that an *ex facie* absolute disposition operates as a deed of divestiture, for it is of the essence of such a title that all the consequences legally deducible from it should receive full effect, and that all other interests are subordinated to that of the nominal proprietor, and reduced to the level of personal rights.

1489. "There is an important distinction," said Lord Fullerton, in a leading case,(*r*) "between a disposition which *in gremio* contains a trust, and sets forth certain specific trust purposes, and a disposition which is *ex facie* absolute, but is qualified by a separate back-bond by the disponent, containing a general declaration of

(*m*) *Torry Anderson v. Buchanan*, 2 June 1887, 15 Sh. 1078. The trust, however, may be revoked by the wife after the dissolution of the marriage ; *Cunninghame v. M'Leod*, 13 Aug. 1846, 5 Bell, 210, affirming 3 D. 1288. The cases are commented on in the next chapter.

(*n*) *Muller v. Dickson*, 11 Feb. 1854, 16 D. 586.

(*o*) *Coltart v. Corrie*, 26 March 1853, 15 D. 606.

(*p*) *M'Lelland v. Bank of Scotland*, 27 Feb. 1857, 19 D. 574 ; see *Brough v. Jolly*, 1793, M. 2585 ; *Leckie v. Leckie*, 21 Nov. 1854, 17 D. 77, 81 ; *Walker v. Buchanan, Kennedy, & Co.*, 11 Dec. 1857, 20 D. 259.

(*q*) 19 D. 581, *per* Lord Colonsay.

(*r*) *Robertson v. Duff*, 14 Jan. 1840, 2 D. 279.

trust. The first does not divest the grantor, but merely burdens his right; the latter does divest him, leaving him merely the creditor on the trustee's obligation to reconvey."^(s) It was at one time considered doubtful whether this exception was not confined to the case where the disponent was infert, and the interest of the truster remained personal on an unrecorded back-bond; but since the decision of the whole Court in *Gardyne v. The Royal Bank of Scotland*,^(t) where a creditor, notwithstanding he had recorded a back-bond of trust relative to the disposition, was held to have incurred liability as a legal proprietor, it must be taken as a perfectly general proposition, that a trustee possessing on an *ex facie* absolute conveyance has the radical title.

1490. In a subsequent case Lord Ivory observed,^(u) that the distinction between a disposition *ex facie* absolute and the other forms of security known to law, was very distinctly brought out in the case of *Gardyne v. The Royal Bank*, where the doctrine held by the majority of the Court was not touched by the reversal, viz., that it is of the essence of a title *ex facie* absolute that all the consequences lawfully deducible from it should receive effect. In the case of an ordinary security, the original investiture of the party granting the security reserved his radical title to the estate, and the security was a mere burden. But if, on the contrary, the proprietor divested himself by disposition *ex facie* absolute, he no longer remained proprietor of the estate. He had a radical interest in the estate, but not the radical title; and it was through the party to whom he had conveyed it that he must obtain a reconveyance and retrocession of his rights.

M'Lelland v. Bank of Scotland.
The delivery of an *ex facie* absolute disposition, no matter how qualified, *ipso facto* divests the grantor of his title.

1491. Where there are two conflicting titles of fee in the same estate, it is often a matter of difficulty to determine which of the two ought to be considered a burden upon the other. The case of security titles, to which we have just referred, is one, but not the only example of the difficulty. Another class of cases, equally perplexing, is that of an entail and a trust right created by the same party, and subsisting contemporaneously. It has been usual to regard the trust as the subordinate right, even though it absorbs the entire revenues of the estate during the period of its subsistence; and this view seems the more consonant with principle, for the entail is a permanent interest, and inheritable, while the trust is in its nature temporary, and is, when coupled with an entail, de-

Double trusts of same estate. Difficulty in determining in which party the radical title resides.

^(s) 2 D. 291.

whole Court; reversed upon another ground, 1 Macq. 358.

^(t) *Gardyne v. Royal Bank of Scotland*, 8 March 1851, 13 D. 912, decided by the

^(u) *M'Lelland v. Bank of Scotland*, *ut supra*, 19 D. 588.

CHAPTER XLV. signed in most cases to be ancillary to the ultimate settlement of the succession. This, accordingly, was the view taken of the reciprocal relations of two such coincident rights in the *Strathmore* succession case, (x) in the *Clanranald* case, (y) and in *M'Millan v. Campbell*.(z) But in *Melville v. Preston*,(a) the trust was held (we think erroneously) to be the leading title. What the Court really decided was, that although infestment had been taken on a deed of entail after the settlor's death, the trustees were entitled, in virtue of a power to that effect, to complete a feudal title to the estates,—and it is clear that they were entitled to have their right perfected by sasine, on any view of its nature. The judges, however, seem to have assumed that the appropriation of the revenues to the purposes of the trust was sufficient to reduce the right of the heirs of entail to the position of a burden—a ratio which would equally apply to the case of a proprietor whose rents are absorbed by a trust *inter vivos*. The fact that in *Preston's* case the right of entering vassals was expressly reserved to the heirs of entail, ought, we think, to have been held sufficient evidence of an intention to give the heirs the status of heritable proprietors from the outset.

Extension of
the principle of
the truster's
radical right.

1492. The nature of a truster's radical right in the estate may be further illustrated by a variety of cases in which it has been recognised in competition with other rights; for example, in questions between the trustee and purchasers(b) or borrowers(c) from the granter, or adjudgers of his interest;(d) in questions between the granter and the creditors of the trustee;(e) and in questions between the truster's heirs-at-law and the grantees under conveyances executed by the truster before being retrocessed.(f) It has been decided that the truster, and not the trustee or beneficiary under a trust *inter vivos*, is the party entitled to vote in the election of a member of Parliament.(g) In all questions as to the right of

(x) *Strathmore v. Strathmore's Trs.*, 23 March 1831, 5 W. & S. 170.

(y) *Herries, Farquhar, & Co. v. Brown*, 9 March 1838, 16 Sh. 948.

(z) *M'Millan v. Campbell*, 4 March 1831, 9 Sh. 551. See also *Macrae v. Macrae*, 27 June 1839, M'L. & Rob. 645, affirming 15 Sh. 54.

(a) *Melville v. Preston*, 8 Feb. 1838, 16 Sh. 457, affirmed 29 March 1841, 2 Rob. 45. See also *Douglas & Co. v. Glassford*, 10 June 1825, 1 W. & S. 323.

(b) *Barbour v. Bell*, 25 Jan. 1831, 9 Sh. 334.

(c) *Lindsay v. Giles*, 27 Feb. 1844, 6 D. 771.

(d) *Campbell v. Edderline's Crs.*, 14 Jan. 1801, M. "Adjudication," App. No. 11.

(e) *Paul v. M'Leod*, 20 May 1828, 6 Sh. 826; *Gordon v. Cheyne*, 5 Feb. 1824, F.C. The rule, however, is otherwise in the case of latent trusts; *Sommerville v. Redfearn*, 1 June 1813, 5 Pat. 707, reversing M. "Personal and Real," App. No. 3; *Dingwall v. M'Combie*, June 1822, 1 Sh. 463, N.E. 431.

(f) *M'Millan v. Campbell*, 14 Aug. 1834, 7 W. & S. 441.

(g) *M'Leod v. M'Kenzie*, 17 Nov. 1827, 6 Sh. 77; *Lockhart v. Wingate*, 19 Feb. 1819, F.C.

property which is the subject of the trust, the truster, if he retains his radical interest, is a necessary, *(h)* and generally the only necessary defender. *(i)* The truster's heir must make up his title by service; and unless he does so, the radical title remains in the *hereditas jacens* of the truster, and passes to the next heir. *(k)*

1493. The powers of the truster in virtue of his radical right are as extensive as those of the proprietor of a fee-simple estate unburdened; for example, he may sell; *(l)* borrow on the security of the estate; *(m)* grant leases, unless restricted by the trust; *(n)* and dispose of the *universitas* of the reversionary estate by testamentary settlement *(o)* or marriage-contract. *(p)* It has been expressly decided that he may execute an entail of the estate by direct conveyance, without the intervention or consent of the trustee. *(q)* The truster is entitled to sue and defend actions regarding the estate, *(r)* a right which also belongs to a bankrupt whose affairs are under trust in virtue of the legal diligence of sequestration. *(s)* Finally, he has the right of demanding a reconveyance from the trustee after the purposes of the trust are fulfilled; *(t)* and, after retrocession and discharge, his right to the estate cannot be challenged by the creditors, except on the ground of fraud. *(u)* The trustee is at the same time liberated by the force of the reconveyance from all his engagements to the truster, and from all liabilities to third parties for contracts or transactions subsequent to the reconveyance. *(x)*

1494. The right of the truster's creditors to attach the estate for the purpose of securing the reversionary interest, depends upon the consideration, whether the truster is effectually divested. We have elsewhere seen that creditors whose rights are anterior to the trust, are entitled to claim the benefit of the trust-conveyance at any time before the final distribution of the estate. *(y)* With regard to creditors whose rights are subsequent in date to the constitution of

CHAPTER XLV.

Powers of a truster retaining the radical right in the estate conveyed in trust.

Nature of the interest of the truster's creditors in the reversionary estate.

(h) *Bell v. Maxwell*, 13 Dec. 1828, 7 Sh. 198.

(i) *Meiklam v. Glassford*, 4 Dec. 1851, 14 D. 137.

(k) *Broughton v. Fraser*, 8 March 1832, 10 Sh. 418.

(l) *Barbour v. Bell*, 25 Jan. 1881, 9 Sh. 334.

(m) *Innes v. Innes*, 18 Dec. 1828, 7 Sh. 206; *Lindsay v. Giles*, *supra*.

(n) As to the powers usually given, see *Melville v. Preston*, *supra*.

(o) *Renton v. Girvan*, 20 Dec. 1833, 12 Sh. 266.

(p) *Herries, Farquhar, & Co. v. Brown*, 9 March 1838, 16 Sh. 948.

(q) *M'Millan v. Campbell*, 14 Aug. 1834, 7 W. & S. 441.

(r) *Bell v. Maxwell*, *Meiklam v. Glassford*, *supra*. See *Thornton v. Thornton*, 25 Nov. 1845, 8 D. 87; *Meggett v. Campbell*, 4 June 1888, 11 Sh. 675.

(s) *King v. Wieland*, 25 May 1858, 20 D. 960; *MacKenzie v. Smith*, 26 June 1861, 23 D. 1201.

(t) *Walker v. Buchanan, Kennedy, & Co.*, 11 Dec. 1857, 20 D. 267; *Martin v. Thoms*, 8 Dec. 1856, 15 Sh. 227.

(u) See *Whyte v. Knox*, 26 May 1858, 20 D. 970.

(x) See *Wilson v. Alexander*, M. 13,968; 12 Aug. 1807, 5 Pat. 182.

(y) Chapter 67; *Pagan v. Eaton*, 17 Jan. 1828, 2 Sh. 125, N. E. 117.

CHAPTER XLV. the trust, the truster's interest is the measure of that of the creditor's. If the radical title remains in his person, the reversion may be attached by adjudication at the instance of subsequent creditors ; (z) and even where, as in the case of trusts constituted by *ex facie* absolute disposition, the truster has only a personal right to demand a reconveyance, that right is still heritable and adjudgeable. And, in either case, it would seem that a subsequent voluntary conveyance of the reversionary interest to a trustee for behoof of the postponed creditors, is a perfectly competent proceeding.(a) If, on the other hand, the truster is entirely divested, which can only happen when his residuary interest is not only disposed of, but taken out of his possession by a delivered conveyance of the reversionary interest to beneficiaries, or to a trustee for their behoof, followed by possession,(b) then, as the granter can no longer qualify either a title to, or an interest in the estate, it is necessarily and effectually placed beyond the reach of his creditors.(c)

(z) *Campbell v. Edderline's Crs.*, *supra*; *Herries v. Burnett*, 20 Nov. 1846, 9 D. 111; *Barbour v. M'Minn*, 7 July 1826, 4 Sh. 806, N. E. 813; *Renton v. Girvan*, 20 Dec. 1833, 12 Sh. 266.

(a) Bell's Com. 6th ed. p. 851.

(b) *Turnbull v. Tawse*, 15 April 1825, 1

W. & S. 80; *Fairlie v. Ferguson*, 11 July 1827, 5 Sh. 937, N. E. 871; *Globe Insur. Co. v. Murray*, 15 Dec. 1854, 17 D. 217; *Graham v. Forbes*, 5 Mar. 1829, 7 Sh. 543.

(c) *Wright v. Harley*, 2 June 1847, 9 D. 1151; *Smitton v. Tod*, 12 Dec. 1839, 2 D. 225.

CHAPTER XLVI.

OF THE SEPARATE ESTATE OF A MARRIED WOMAN.

1495. The practice of settling the property of married women to their separate use, exclusive of the husband's marital rights, is not of great antiquity. Lord Stair disputed the possibility of excluding the husband's proprietary rights; alleging as a reason, that "the very right of the reservation becomes the husband's, *jure mariti*, and makes it illusory and ineffectual—as always running back upon the husband himself—as water thrown upon a higher ground doth ever return." (a) But such notions, which originated in times anterior to the development of our present system of equitable jurisprudence, (b) have long since been discarded; and the settlement of the wife's estate by marriage-contract, to the exclusion of the husband's rights, has received the sanction of our courts of law as the proper mode of securing her interest from the operation of the rule of law under which the whole of the wife's personal property, as well as her life interest in lands, are made subject to the diligence of the husband's creditors. (c)

Origin of the practice of settling estates to separate use.

1496. It is, however, not a little remarkable, considering the liberal spirit of the Scotch law in relation to marriage-contracts—as evinced by the facilities which it affords for the conferring of a *jus crediti* upon wives and children by such contracts—that the Court should have entirely ignored (d) the equitable claim which a married woman may justly prefer, to have an alimentary allowance secured to her out of her patrimonial estate, preferable to, or at least co-ordinate with that of the husband's creditors. (e) This defect in

Wife has no claim to a settlement out of her property at common law.

(a) Stair, 1, 4, 9; Dirleton *contra, voce* "*Jus Mariti*."

(b) See notes on the case of *Nicolson v. Inglis*, 1678, in Elch. Annot. p. 10; and Fountainhall, 3 Br. Sup. 469. See also *Campbell v. Sandilands*, 1682, M. 5836; *Vallance v. M'Dowall*, 1709, M. 5840. The competency of such renunciation had previously been sustained in *Collington v. Collington*, 1667, M. 5828.

(c) See Ersk. 1, 6, 14; Bankt. vol. i, p. 108; Bell's Com. 5th ed. vol. i., p. 638; 1 Fraser, 406.

(d) *Turnbull v. Turnbull's Cr.*, 1700, M. 5895; *Robb v. Robb's Tr.*, 1794, M. 5900; but see Bell's Pr. § 1944; *Anderson v. Pitcairn*, 8 June 1889, 1 D. 889.

(e) In England the jurisdiction to compel the husband, or those claiming under him, to make a settlement upon the wife,

CHAPTER XLVI.

Wife's claim to a settlement under the Conjugal Rights Act.

our jurisprudence has at length been remedied by a provision of the Conjugal Rights Act 1861, which enacts, that "when a married woman succeeds to property, or acquires right to it by donation, bequest, or any other means than by the exercise of her own industry, the husband or his creditors, or any other person claiming under or through him, shall not be entitled to claim the same as falling

was assumed by the Court of Chancery in cases where it was necessary to apply to that Court for assistance in order to obtain possession of the wife's property—1 Wh. & T. L. Ca. 862, 8d ed. 402—when the Court, acting on the maxim that he who seeks equity must do equity, refused to interfere unless a provision were settled on the wife in fulfilment of the husband's duty of providing for her; *Bosville v. Brander*, 1 P. Wms. 457. The wife's equitable right arising in such circumstances is called her *equity to a settlement*. See *Duchess of Buckingham v. Winterbottom*, 18 June 1851, 13 D. 1129.

The doctrine has since been greatly extended. It is now competent to the wife to assert her right actively, and not merely *ope exceptionis*; *Elibank v. Montolieu*, 5 Ves. 787; 1 Wh. & T. 8d ed. 881; see *Newenham v. Pemberton*, 1 De G. & Sm. 644. The wife's equity to a settlement is binding not only on the husband, but upon his *assignees* in bankruptcy, or under a general trust for payment; and it may be made to affect *legal* as well as *equitable* interests, if the property should become the subject of a Chancery suit; *Sturgis v. Champneys*, 5 My. & Cr. 97, where all the previous authorities are cited by Lord Cottenham. See also *Hanson v. Keating*, 4 Hare, 1, decided by Sir J. Wigram. A wife is entitled to a settlement out of property to which she becomes entitled before, as well as after marriage; *Barrow v. Barrow*, 18 Beav. 529.

Where the wife insists for her equity, it is extended to her *children*; and the Court direct a reference or remit to ascertain what is a proper settlement to be made upon her and her children; *Elibank v. Montolieu*, *ut supra*; *Johnson v. Johnson*, 1 J. & W. 472. But if the wife has died without asserting her right, the children have no claim; *Scriven v. Tapley*, 2 Eden. 887, the leading case; *De la Garde v. Lempriere*, 6 Beav. 344, decided by Lord Langdale.

The questions of greatest importance

with reference to the provisions of the Conjugal Rights Act (24 & 25 Vict., cap. 86, § 16), relate to the amount and the mode of the settlement. As to the amount, the usual practice of the Court of Chancery is to settle one-half of the wife's property upon herself, reserving the other half for the husband or his creditors; see Wh. & T. L. Ca. 8d ed. 420. But in particular circumstances the rule may be varied. In one case, where a husband had separated from his wife, leaving her unprovided for, Sir L. Shadwell, V.-C., gave her three-fourths; *Coster v. Coster*, 9 Sim. 597. See also *ex parte Pugh*, 1 Drew, 202; *Vaughan v. Buck*, 1 Sim. N. S. 284. By recent cases it has been settled, after considerable fluctuation, and notwithstanding the authority of an adverse decision by Lord Ch. Sugden (*Napier v. Napier*, 1 D. & W. 407), that the Court may in special circumstances settle the whole fund on the wife; as, for example, where the husband has already received large sums from the wife's father, which have been squandered or applied in liquidation of debt; *Gardner v. Marshall*, 14 Sim. 575; or where the fund is of inconsiderable amount; *in re Kincaid's Trusts*, 1 Drew. 826; or where there has been misconduct on the part of the husband; *Dunkley v. Dunkley*, 2 De G. M. & G. 390; *in re Cutler*, 14 Beav. 220; *in re Merriman's Trusts*, 81 L. J. Ch. 367.

As to the mode of settlement, it seems the usual practice of the Court of Chancery is to settle the income of the fund upon the wife to her separate use, and the capital upon the children, payable in the case of sons at majority, in the case of daughters, at majority or marriage; *Gent v. Harris*, 10 Hare, 388, 384; *Francis v. Brooking*, 19 Beav. 349. If there should be no issue, the reversion will be given to the surviving spouse; *Carter v. Taggart*, 1 De G. M. & G. 286; *Bagshaw v. Winter*, 5 De G. & Sm. 466.

within the *communio bonorum*, or under the *jus mariti* or husband's right of administration, except on the condition of making therefrom a reasonable provision for the support and maintenance of the wife, if a claim therefor be made on her behalf." The amount of the wife's provision is by this section left to the discretion of the Court of Session, to be exercised "with reference to any provisions previously secured in favour of the wife, and any other property belonging to her exempt from the *jus mariti*." (*f*) But the statutory claim is liable to be defeated by priority of diligence; and it is by a conventional exclusion of the *jus mariti* and right of administration that preferable and fixed provisions can alone be secured to the use of a married woman out of her patrimonial estate. (*g*)

Wife's claim liable to be defeated by diligence, etc.

1497. The principle of the common law, which, by the fiction of a legal assignation, vests in the husband for the common benefit the whole of the wife's moveable property, *acquisita et acquirenda*, as well as the usufructuary interest in her heritable estate, does not oppose any theoretical obstacle to a separation of interests, provided the separation be effected by express words of contract anterior to the constitution of the marriage relation; (*h*) and, accordingly, it has long been settled in practice that an express renunciation or exclusion of the *jus mariti* and right of administration in relation to any particular estate, suffices to protect that estate from the deeds of the husband and the diligence of his creditors. (*i*) It was argued, with some plausibility indeed, that however effectual such clauses might be to exclude the rights of the husband's creditors as regards the wife's interests in heritable estate, yet that the separation of interests in relation to moveables by private deed was ineffectual against creditors, who were entitled to rely on the operation of the law as effecting a transference of the wife's property to the husband, until intimation was made to the contrary. (*k*) But

Renunciation of marital rights by antenuptial contract creates a separate interest in the wife.

(*f*) 24 & 25 Vict., c. 86, § 16.

(*g*) The provisions of a prior section of this Statute, under which a wife deserted by her husband may obtain a decree protecting her property, also fall to be noticed under this head. See *Pet. Walker*, 17 Jan. 1862, 24 D. 300; *Pet. Turnbull*, 14 Jan. 1864, 2 Macph. 402. The corresponding English enactment is 20 & 21 Vict., cap. 85, §§ 21-26.

(*h*) But if the exclusion is by *mortis causa* deed, a later settlement renewing the bequest, without excluding the husband's rights, operates an implied revocation of the excluding provision in the first deed; *Macalister's Trs. v. Macdonald*, 1763, M. 6600.

(*i*) *Ersk.* 1, 6, 14; *Bell's Com.*, 5th ed. 1, 638; *Sandilands v. Mercer*, 30 May 1838, 11 Sh. 665; *Murray v. Dalrymple*, 1745, M. 5843; *Dickson v. Braidfoot*, 1705, M. 10,396; *Gordon v. Gordon*, 16 Nov. 1832, 11 Sh. 86 (where the wife's separate estate was held to be assignable without the husband's consent). An assignation in security of a subject from which the *jus mariti* and right of administration is excluded, carries the right to interest as well as principal; *Smith v. Frier*, 7 Feb. 1857, 19 D. 884.

(*k*) *Rollo v. Ramsay*, 28 Nov. 1832, 11 Sh. 182. As regards corporeal moveables, furniture, etc., there is no doubt that the principle of reputed ownership has been held applicable, and that a conveyance by

CHAPTER XLVI. this technical difficulty was not allowed to stand in the way of the recognition of the wife's right to contract for the settlement of her estate to her separate use.

Rollo v. Ramsay.

1498. Lord Mackenzie's reply to the argument in question, as stated in the case of *Rollo v. Ramsay*, seems to remove the difficulty. "The legal assignation," he said, "of the wife's moveable fortune by marriage to the husband never can be supposed to have existed at all, in contradiction to such conveyances contained in the antenuptial contract on which the marriage proceeds. As to intimation, if the *jus mariti* had been expressly excluded, intimation of such exclusion never is held necessary, even to bar the debtors of the wife from paying to the husband, far less to exclude the creditors of the husband from taking the wife's separate estate. No party has a right to assume that a wife was married without a marriage-contract, and that all her moveable property must have passed to her husband by the operation of law. Parties interested must inquire what were the actual conditions of the marriage." (l)

What terms import an exclusion of the *jus mariti*.

1499. It would appear that the *jus mariti* may even be excluded by implication, (m)—e.g., by a destination to "the liferent use" of the lady, where the property has come from her relatives, or was her own, or by terms importing that her interest is alimentary; for an alimentary provision, being *ex sua natura* exclusive of all interests adverse to that of the beneficiary, the use of this term is sufficient evidence of the intention to exclude the claims of the husband and his creditors. (n) Bequests and provisions to a married woman "for her own use," (o) or prohibiting the husband "to seek the principal sum" during her lifetime, (p) or declaring that the wife shall enjoy the fund "independent of her then or any future husband," (q) or that she shall "choose managers of it," (r) have been sustained as exclusive of the marital rights. And where the *jus mariti* is *per expressum* renounced or excluded in relation to the rents of heritable estate, the addition of general words, such as an exclusion of "all other right and title," or "debarring the husband from any concern" with the funds, will be construed as applicable to the right of administration. (s) An exclusion of the marital rights in

marriage-contract of all the husband's furniture, etc., to the wife, is inoperative. See the cases of *Campbell v. Stewart*, and *Brown v. Fleming*, *infra*, § 1502.

(l) 11 Sh. 184.

(m) See the corresponding English cases cited in 1 Wh. & T. 418, 8d ed. 465. No particular words are necessary to limit an estate to the wife's separate use (see Bell's Com. 6th ed. p. 675).

(n) *Per* Lord Mackenzie in *Downie v. Pearson*, 9 Feb. 1841, 3 D. 504; *Annand v. Chessels*, *infra*.

(o) *Stables v. Murray*, 1789, 1 Fraser, 411.

(p) *Humbie v. Hume*, 1684, M. 5938.

(q) *Commercial Bank v. Black*, 23 June 1842, 14 Jur. 528.

(r) *Hunter v. Smith*, 1798, 1 Fraser, 410.

(s) *Keggie v. Christie*, 25 May 1815, F.C.; *Gowan v. Pursell*, 17 May 1822, 1 Sh. 418.

regard to a particular fund, applies to the interest of the fund as well as to the capital.^(t) CHAPTER XLVI.

1500. As the legal assignation of marriage brings under the *jus mariti* the whole of the wife's personal interest in her property, except in so far as it is expressly excluded, no irrevocable separation of interests can be effected by the act of the spouses subsequent to marriage. The parties are then no longer in the position of being free to contract, and creditors are entitled to rely upon the continuance of the husband's control over the common property.^(u) With regard to property acquired by the wife subsequently to the marriage, it is held that an exclusion of the marital rights by third parties is effectual, on the principle that the granter may attach such conditions as he pleases to a gratuitous disposition of his property.^(x) And a general antenuptial conveyance of all the wife's estate (including *acquirenda*) to the husband, gives him no right to an estate or fund subsequently limited by a stranger to the wife's separate use.^(y)

Husband's rights cannot be effectually excluded after marriage.

1501. An estate for the wife's separate use may be constituted by a conveyance to trustees, or to the wife herself, either absolutely,^(z) or in trust for behoof of herself in liferent and her children in fee,^(a) or with such other substitutions as may be desired. A conveyance to the husband and wife jointly, for her behoof,^(b) or to trustees for her behoof,^(c) or to the husband and wife in conjunct fee and liferent,^(d) without express words of exclusion, will be equally effectual. It may be observed, however, that in the class of cases in which destinations in conjunct fee and liferent, without restrictive words, have been held to exclude the husband's right of disposal, the interests of the children have very materially affected the rules of construction;^(e) and it would not be safe to trust to the effect of a simple conveyance to trustees for the wife's

Constitution of separate estate by conveyance to the wife, or to trustees for her behoof.

(t) *Robertson v. Robertson*, 10 Feb. 1835, 13 Sh. 442; *Hutchison v. Hutchison's Trs.*, 10 June 1842, 4 D. 1399. And where such an exclusion is directed with reference to the shares of daughters in a clause of distribution with provision of survivorship, the exclusion applies to the accruing as well as to the original shares; *Re Jarman's Trusts*, 1 Eq. 71 (Law Rep.).

(u) Bell's Prin. § 1942; *Shearer v. Christie*, 18 Nov. 1842, 5 D. 132. As to whether such an agreement is binding on the husband *ratione alimentorum*, see *Davidson v. Davidson*, 28 March 1867, 5 Macph. 710.

(x) *Annand v. Chessels*, 24 March 1775, 2 Pat. 869, affirming M. 5844.

(y) *Thurburn's Trs. v. MacLaine*, 24 Nov. 1864, 3 Macph. 134.

(z) *Young v. Loudoun*, 26 June 1855, 17 D. 998.

(a) *Annand v. Chessels*, *supra*.

(b) *Gairdners v. Royal Bank of Scotland*, 22 June 1815, F.C.

(c) *Balderston v. Fulton*, 23 Jan. 1857, 19 D. 293.

(d) *Rollo v. Ramsay*, *supra*.

(e) See *Fraser v. Brown*, 1707, M. 4259; *Mackellar v. Marquis*, 4 Dec. 1840, 3 D. 172.

CHAPTER XLVI. separate use, unaccompanied by words exclusive of the *jus mariti* and right of administration. (f)

Exclusion of husband's rights in a general conveyance of wife's property.

Exclusion of husband's rights in relation to *acquirenda*;

and in relation to corporeal moveables.

Right of voluntary conveyance excluded by vesting wife's estate in trustees for her separate use.

1502. It seems at one time to have been held, that the husband's rights could not be excluded by a *general* conveyance even in an antenuptial contract; because, the *jus mariti* being an interest strongly founded in law, it was thought improper that it should be taken away *per aversionem*, or by implication. (g) For this reason an exclusion of the *jus mariti* in a marriage-contract, proceeding on the narrative that the wife was possessed of personal effects to the extent of £200, was held insufficient to exclude certain furniture, which had not been inventoried, from the diligence of the husband's creditors; (h) and a general reservation of the wife's right to her separate property was, on the same principle, disregarded. (i) But the rule was never extended to the case of a marriage-contract conveyance of a right of succession to the wife, for her separate use; (k) and it is now settled that even property to which a wife *might thereafter succeed* is capable of being settled upon herself by anticipation. (l) In the case of *Macdonald v. Loudoun*, a question of this nature was the subject of consideration, in reference to a conveyance of a house and furniture by a third party, executed before the lady's marriage, and "exclusive of the *jus mariti* and right of administration of any husband she may marry." It was held, in a question with a poinding creditor, that a separate estate had been effectually created; although it was argued with considerable force on the other side, that the husband's possession of the furniture must be presumed to have been in virtue of a right of property. (m) On the other hand, it has been decided that an antenuptial settlement of household furniture and similar effects (n) by a husband to the wife's separate use, excluding his own *jus mariti*, does not, even when accompanied by an inventory of the property, (o) create a separate estate, or even a security in favour of the wife.

1503. A simple exclusion of the marital rights by marriage-

(f) See *Balderston v. Fulton*, 28 Jan. 1857, 19 D. 298, in which the effect of such a conveyance is commented upon.

(g) And also because the rights of the husband's creditors to attach the estate in his possession for his debts can only be excluded by showing a title to the specific estate in some other person; *Jameson v. Strachan*, 27 Jan. 1835, 13 Sh. 318.

(h) *Macdonald v. Doig*, 1793, M. 5848; see *Greig v. Wemyss*, 1670, M. 5882.

(i) *Cuthbertson v. Pollock*, 1799, Hume, 206.

(k) See *Annand v. Scott*, 2 Paton, 869.

(l) *Greenhill v. Ford*, 24 June 1824, 8 Sh. 169, N.E. 114; *Hutchison v. Hutchison*, 10 June 1842, 4 D. 1399; *Babington v. Babington*, 30 June 1840, per Lord Jeffrey, 1 Fraser, 413.

(m) *Macdonald v. Loudoun*, 26 June 1855, 17 D. 998.

(n) *Darling v. Mein*, 20 Dec. 1851, 14 D. 296; *Scott v. Price*, 18 May 1837, 15 Sh. 916.

(o) *Campbell v. Stewart*, 13 June 1848, 10 D. 1280; *Brown v. Fleming*, 19 Dec. 1850, 13 D. 373.

contract, although sufficient to protect the wife's estate from the diligence of the husband's creditors, by depriving the husband of his legal interest in it, leaves the wife's powers of disposal unimpaired. The husband has, therefore, still the means of operating upon the property through his moral influence with the wife, which he may use for his own advantage, and from the operation of which the power of revocation is neither a satisfactory nor a complete protection.^(p) This source of danger to the wife's interests may, however, be completely obviated by the method of a conveyance made to trustees, for the wife's separate and exclusive use, and declared to be irrevocable. Although, as a general rule, a party cannot deprive himself of the control of his property, except by giving a vested interest in it to another, yet, as this is an equitable rule, the benefit of which can only be claimed by the party himself or his creditors, it was found that it would not apply to the case of a trust for the preservation of the wife's separate interest *stante matrimonio*;^(q) for, in this case, the preservation of the trust was beneficial to her interests, and its destruction could only benefit the husband.

Wife may by antenuptial contract vest her own property in trustees for her separate use.

1504. The doctrine under consideration is established by the leading case of *Torry Anderson v. Buchanan*,^(r) where the rule was authoritatively laid down, that a trust constituted in such circumstances, and declared to be irrevocable, was binding to all intents and purposes. It is observed, in the joint opinion of Lord President Boyle and Lords Gillies and Cuninghame, that a condition of this nature is entitled to effect if it be not plainly irrational, or contrary to some well recognised authority or principle of the law. So

Torry Anderson's case.

^(p) See, however, *Fernie v. Colquhoun's Trs.*, 20 Dec. 1854, 17 D. 233.

^(q) The English doctrine of Fraud upon Marital Powers deserves to be studied in connection with this branch of the law. The doctrine, as settled in the leading case of *Strathmore v. Bowes*, 1 Ves. 22, was thus stated in a more recent case by Lord Langdale: "If a woman entitled to property enters into a treaty for marriage, and, during the treaty, represents to her intended husband that she is so entitled—that, upon the marriage, he will become entitled *jure mariti*; and if, during the same treaty, she clandestinely conveys away the property in such way as to defeat his marital right, and secure to herself the separate use of it, and the concealment continues till the marriage takes place, there can be no doubt but that a fraud is thus practised upon the

husband, and he is entitled to relief;" *England v. Downs*, 2 Beav. 528. The relief is given by setting aside the settlement. See the cases explained in 1 Wh. & T. L. Ca. 833, 3d ed. 372. The only modern Scotch case raising a question of this nature is *Murison v. Dick*, 9 Feb. 1854, 16 D. 529, where a lady was held entitled to revoke a trust-settlement of her estate executed *intuitu matrimonii*, and to re-settle her property in a way more agreeable to the wishes of her intended husband. See the cases as to deeds in prejudice of the marital right granted after proclamation of banns, M. pp. 6029–6038, and Mr Fraser's observations, 1 Pers. & Dom. Rel. p. 347.

^(r) *Torry Anderson v. Buchanan*, 2 June 1837, 15 Sh. 1073; see also *Sandilands v. Mercer*, 30 May 1838, 11 Sh. 665.

CHAPTER XLVI. far from it being repugnant to any known law or authority, these judges were of opinion that a trust constituted before marriage, and placed beyond the power of recall by the spouses, was highly expedient, and entitled to the utmost support and protection. An opinion, however, was expressed, to the effect that the trust was revocable after the dissolution of the marriage; a view which afterwards received the sanction of the concurring decisions of the Court of Session and House of Lords, in *Cunninghame v. M'Leod*.^(s) And a reasonable antenuptial contract, by which a minor lady conveyed to trustees a provision which only vested in her on marriage, was found to be valid, and not to be reducible at the instance of creditors claiming upon debts contracted by the lady before marriage, under the Act 1621, cap. 18, as a deed granted "without just, true, and necessary cause."^(t)

Such trusts are revocable after the dissolution of the marriage.

Alienation prevented by alimentary clause.

1505. In place of resorting to a trust-conveyance of the wife's estate, the object of protecting her estate against the husband's influence, may, to a certain extent at least, be attained by conveying to the exclusive use of the wife herself, under the conditions already referred to, subject to the declaration that her interest is *alimentary*. The operation of such a provision, which seems to be analogous in its effects to the English clause against anticipation,^(u) has not been much considered by the jurists of this country. On principle, such a declaration must be held to import a restraint on the wife's power of burdening or disposing of her interest, either in possession or expectancy. It is a well established rule, that where the subject conveyed to a beneficiary is merely a liferent interest, the limitation of that interest to the beneficiary's alimentary use will be sustained to a reasonable extent, even in the case of a disposition to a person *sui juris*,^(x) and much more in the case of a gift to a married woman.

To what extent alimentary titles are effectual.

1506. What is a reasonable alimentary provision is a question of circumstances. In one case, a liferent alimentary annuity of £1500 per annum to the granter's nephew was held to be not unreasonable in amount, reference being had to the rank and circumstances of the annuitant;^(y) and a preference was accordingly given to his alimentary creditors. And where a married woman assigned her alimentary estate in security of advances made to her

(s) *Cunninghame v. M'Leod*, 13 Aug. 1846, 5 Bell, 210, affirming 8 D. 1288; where it was also held that an antenuptial contract was revocable in so far as it contained a destination to heirs-general.

(t) *Carphin v. Clapperton*, 24 May 1867, 5 Macph. 797.

(u) See Lewin on Trusts, 5th ed. p. 536.

(x) Stair, 8, 1, 87; Ersk. 8, 6, 7; Bell's Com. 528, 5th ed. 1, 128.

(y) *Earl of Buchan v. His Crs.*, 13 Sh. 1112; see *Stewart v. Hunter's Trs.*, 10 Mar. 1848, 10 D. 922.

husband at her request, to enable him to retrieve his affairs, the House of Lords, in a reduction at her instance, declared the assignation to be invalid.(z) There is no instance of an alimentary life-rent provision by a stranger in favour of a married lady having been judicially set aside or restricted in amount. But alimentary conveyances by husbands in antenuptial contracts will only be sustained to the full extent in a question with creditors where there has been a *bona fide* separation of the subject from his other property.(a) "It is not disputed," said Lord Campbell,(b) "that the law of Scotland recognises the settlement of property as an alimentary provision for a married woman, and that it may be made not assignable or subject to debt or diligence, according to the principles upon which many cases have been decided in England, which are all to be found cited in *Tullett v. Armstrong*."(c)

Rennie v. Ritchie.

1507. In order to secure an alimentary fund against alienation or attachment for debt, the intention must be unequivocally expressed, as the presumption of law is adverse to restrictions on the rights of property.(d) A declaration that the fund is to be considered alimentary is equivalent to an exclusion of creditors;(e) but the use of that word is not essential. A declaration that the fund was for the support and maintenance of the beneficiary was found not to import an exclusion of the diligence of creditors.(f)

What expressions import an alimentary interest.

1508. But while the decisions to which reference has been made establish the proposition, that a settlement to the wife's *alimentary* use will suffice to protect the estate against the diligence of her own as well as her husband's creditors, and also to exclude voluntary alienation on her part during the subsistence of the marriage, it would rather appear that the mere exclusion of the marital rights, even in a life-rent conveyance, is no bar to voluntary alienation; for the wife, being absolute proprietor of the subject, may by her own act assign her interest in anticipation, thereby defeating the very object of the exclusionary clause.(g)

A simple exclusion of the *jus mariti* does not prevent alienation by the wife.

1509. The distinction between the effect of the alimentary clause and that which excludes the marital rights, was very distinctly

Doctrines of the English and the Scotch law compared by Lord Cottenham.

(z) *Rennie v. Ritchie*, *infra*; *Paterson v. Paterson*, 26 Jan. 1849, 11 D. 441.

(a) See the cases of *Darling* and *Campbell*, *supra*. In a question with the husband himself, they of course bind his person and estate; and it seems that the wife's desertion cannot be pleaded in defence of an action for a termly payment; *Smith v. Smith*, 11 Jan. 1866, 4 Macph. 279.

(b) *Rennie v. Ritchie*, 25 April 1845, 4 Bell, 242.

(c) *Tullett v. Armstrong*, 4 My. & Cr. 377.

(d) *Gordon v. Blackburn*, 1697, M. 10,394.

(e) *Harvey v. Calder*, 13 June 1840, 2 D. 1095; *West Nisbet v. Morrison*, 1627, M. 10,368; *Urquhart v. Douglas*, 1788, M. 10,403.

(f) Bell's Com. 5th ed. i. 129; 6th ed. p. 529; but see *contra*, *Wright v. Harley*, 2 June 1847, 9 D. 1151.

(g) See *Rennie v. Ritchie*, 25 Apr. 1845, 4 Bell, 221, 242, 244.

CHAPTER XLVI. pointed out by Lord Cottenham in a passage in which the subject is illustrated by comparison with the rules of the law of England. (h) "When first by the law of this country property was settled to the separate use of the wife, equity considered the wife as a *feme sole* to the extent of having a dominion over the property. But then it was found that *that*, though useful and operative so far as securing to her a dominion over the property so devoted to her support, was open to this difficulty, that she, being considered as a *feme sole*, was of course at liberty to dispose of it as a *feme sole* might have disposed of it, and that of course exposing her to the influence of her husband, was found to destroy the object of giving her a separate property. Therefore, to meet that, the provision was adopted of prohibiting the anticipation of the income of the property, so that she had no dominion over the property till the payment actually became due. That is the provision of the law as it now stands, and that is found perfectly sufficient for the purpose of securing the interests of married women. In Scotland much the same course is adopted, the same objects have been worked out, though not precisely in the same way; but still there is, by the law of Scotland, a protection in favour of an alimentary fund, and there is a provision that the alimentary fund shall not be assignable. These are two provisions very much corresponding with the provisions which have been adopted in the law of England." (i)

Questions (1) as to fee, (2) as to effect of conveyance by a stranger.

1510. To complete the exposition of the subject of trusts of the wife's separate estate, it is necessary to advert to two questions which have recently been made the subject of judicial decision:—*First*, How far a *fee* can be subjected to alimentary restrictions; *secondly*, in the case of estate being conveyed by a stranger to an unmarried woman, excluding the *jus mariti* of any husband she may marry, whether the husband is bound by the restriction, in the absence of any special stipulation to that effect in the contract of marriage. With reference to the first question, it is very doubtful

(1) Whether a *fee* can be made the subject of an alimentary destination.

(h) It appears that the English clause restraining anticipation was devised by Lord Thurlow, and introduced into a settlement of property of which he was trustee; see *Pybus v. Smith*, 8 Bro. C. C. 340, and Lord Cottenham's remarks in *Rennie v. Ritchie*. The condition is valid when annexed to a gift to a married woman for her separate use, whether the subject of the gift be real or personal estate, or whether it be in fee or for life only; *Baggett v. Meux*, 1 C. ll. 138, 1 Ph. 627.

Property given to the wife's separate use, subject to restraint upon anticipation,

may be alienated by her after the dissolution of the marriage; *Tullett v. Armstrong*, 1 Beav. 1, 4 My. & Cr. 377. It was settled, however, in the same case, that although the effect of the restraining clauses is suspended during the period of widowhood, these clauses become again operative in the event of the lady entering into another marriage. A trust for the wife's separate use may, however, be confined to a particular coverture; *Knight v. Knight*, 6 Sim. 121; *Benson v. Benson*, 6 Sim. 126; *Bradley v. Hughes*, 8 Sim. 149.

(i) *Rennie v. Ritchie*, 4 Bell, 244–5.

whether an alimentary conveyance of a fee, or capital sum, to a person *sui juris* can be defended on principle. It would rather seem that the restraint on alienation, which is of the essence of an alimentary provision, is so inconsistent with the nature of a fee, that the grantee could not be prevented from assigning the fee either gratuitously or for onerous causes.^(k) If he should assign, it is difficult to hold that his creditors might not also attach the property by legal diligence; for it is not permitted to any one to retain the faculty of voluntary alienation, and at the same time to withdraw his estate from liability to attachment for his debts.^(l) Practically, an estate in fee belonging to a married woman may be protected, as we have seen, by the interposition of a trust; and we incline to think that an alimentary conveyance to a married woman in fee would be sustained, even where the title was vested in her own person.

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Effect of subsequent acquisition of fee by alimentary life-renter.

1511. The question was raised in the case of *Balderston v. Fulton*,^(m) where there was a general conveyance of estate to trustees for payment of the income thereof to the truster's widow, and after her decease to her daughter, during their respective lives, excluding the *jus mariti* of the daughter's husband; and the trustees were finally directed to make over the fund to the testator's own nearest heirs, after the death of the longest liver of the testator himself, his wife, and his daughter. The daughter having survived her parents, brought a declarator concluding that, as she was her father's nearest heir, she was entitled to have the capital paid over on the joint receipt of herself and her husband, in terms of the destination. The First Division of the Court found that there was vested in the pursuer "a right to the fee or capital of the estate," which belonged to her deceased father, but refused to grant decree for immediate payment, on the ground, as stated by Lord Colonsay, "that there was a settled purpose in the mind of the truster to secure the annual proceeds of the estate to his daughter during her lifetime, exclusive of the *jus mariti* of her husband."⁽ⁿ⁾ A similar opinion was expressed by Lord Deas: "The truster might choose to protect the liferent for the daughter's maintenance, and yet not to exclude either her or her husband from dealing with the fee, subject always to the condition, that the capital must remain intact in the hands of the trustees."^(o)

Balderston v. Fulton.

1512. This decision is clearly distinguishable from the judgment

Beneficial estate in liferent, with power to trustees to make advances.

^(k) Bell's Com, 530, note (b); 5th ed., 1, 130.

^(m) *Balderston v. Fulton*, 23 Jan. 1857, 19 D. 293.

^(l) But see *contra*, *Urquhart v. Douglas*, 1838, M. 10,403.

⁽ⁿ⁾ 19 D. 301.

^(o) 19 D. 300.

CHAPTER XLVI. in the case of *Nisbet v. Tod*, (*p*) where a liferent having been given to a lady who was one of the testator's next of kin, with power to the trustees to make advances to her out of the capital, it was held that, as there was no special appropriation of the capital, the life-renter was entitled to immediate payment of the share of the fee which fell to her *ab intestato*. It has since been determined that a capital sum secured to a lady by marriage-contract "as an alimentary provision for the support" of herself, or of the survivor of the spouses, loses its alimentary character when she becomes a widow; such restrictions on the right of alienation, when contained in marriage-contracts, being supposed to be introduced merely for the purpose of protecting the wife's separate interest during the continuance of the marriage. (*q*)

Whether the husband is bound by anticipatory exclusion of his rights.

1513. The question, whether the husband is bound by an anticipatory exclusion of his martial rights, was argued before the Second Division in the case of *Young v. Loudoun*. The creditors of the husband had executed a poinding of the furniture in his dwelling-house, which was resisted by the wife on the ground that she had acquired the furniture before marriage under her aunt's settlement, by which the house and furniture was conveyed to her exclusive of the *jus mariti* and right of administration of any husband she might marry. For the creditors it was argued, that as the complainer's right to dispose of the estate was absolute before marriage, she might have conveyed it to her husband *per expressum*, by marriage-contract. But such express conveyance was not necessary, for the legal assignation implied in marriage would of itself operate as a conveyance in his favour of every moveable subject which she was entitled to dispose of. The Court found that the legal assignation of marriage did not extend to personal property possessed on a title which excluded the operation of that assignation. (*r*)

Young v. Loudoun.

1514. It will be seen by the following extract from Lord Cowan's opinion in this case, that the view taken of the nature of the wife's interest was similar to that which was the foundation of Lord Cottenham's judgment on the same question, in the leading English case of *Tullett v. Armstrong*; (*s*) "The condition in favour of the wife was inserted in a bequest to her made before marriage. This is a very common condition as to sums provided to unmarried females, especially in provisions by fathers for their unmarried daughters.

(*p*) *Nisbet v. Tod*, 15 Jan. 1848, 10 D. 861.

(*q*) *Martin v. Bannatyne*, 8 Mar. 1861, 28 D. 705; see 709.

(*r*) *Young v. Loudoun*, 26 June 1855, 17 D. 998.

(*s*) 4 My. & Cr. 877; see Lord Cottenham's opinion, p. 892.

But if, as in this case, the lady's right is to be held assigned to her husband by the fact of her marrying without a contract of marriage, the condition attached to the bequest or provision must, in every such case, be rendered abortive. It is *jure mariti* that the wife's fortune becomes vested in the husband. The marriage does not carry her moveable estate to him, when the *jus mariti* has been effectually excluded; and the question truly resolves into the inquiry, whether his legal rights over his estate have or have not been excluded *cum effectu*. For the legal assignation implied in marriage cannot carry any subject which stood well excluded from the operation of the *jus mariti*. That such exclusion may be declared by a third party when the bequest is to a married woman, is not disputed; but if this can be legally done at all without consent of the husband, there is neither principle nor authority for holding it illegal when the donee is still unmarried; and the donor being admitted to have had power to exclude the *jus mariti*, there is an end of the case stated by the creditors."(*t*)

1515. Where the wife's separate estate is vested by contract in her own person, there may be some difficulty in distinguishing her estate from that of her husband after the dissolution of the marriage, in consequence of changes in the investments. Upon this subject, the reader may consult the case of *Cuthill v. Burns*,(*u*) where the Court directed an investigation by an accountant, and being satisfied from his report that two sums of £6000 and £300, which had been deposited in bank in the joint names of the spouses and of the longest liver, were the produce of the wife's separate estate, gave judgment accordingly, though the result of sustaining the claim was to carry away the greater part of the succession.

Identification of
wife's separate
estate.

(*t*) 17 D. p. 1001-2.

(*u*) *Cuthill v. Burns*, 20 Mar. 1862, 24 D. 849.

CHAPTER XLVII.

OF TRUSTS CONSTITUTED BY DECLARATION OR
ACKNOWLEDGMENT.

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|---|--|--|
| I. <i>To what Transactions the Statute applies.</i> | | III. <i>Evidence in questions with third</i> |
| II. <i>Evidence required by the Statute.</i> | | <i>parties.</i> |

Trust may be
declared by
disposition or
back-bond.

1516. A trust may be constituted either by a regular trust-disposition (wherein the granter himself declares the purposes, either expressly or by reference to some other writing under his hand), or by *ex facie* absolute disposition, qualified by a back-bond or acknowledgment of trust under the hand of the *trustee*. The form of a disposition *ex facie* in trust (called a trust-disposition and settlement) is the one usually employed in the constitution of testamentary trusts and family settlements. The form of an *ex facie* absolute disposition and back-bond is more frequently resorted to for the creation of trusts *inter vivos* connected with the management or disencumbrance of the trust property, or the extrication of the truster's affairs. This form has the advantage of enabling the trustee to transact with third parties with greater facility, and to execute conveyances in favour of purchasers without disclosing the conditions and purposes of the trust. The purchaser is not bound by, and has no right to inquire into, conditions which do not enter the record, these being merely personally binding on the trustee. (a) Therefore, even in a case where an *ex facie* absolute disposition bore to be granted "for the causes and considerations mentioned in a back-bond," the Court refused to permit an inquiry into those causes at the instance of a purchaser, to whom part of the estate had been feued out. (b) The disadvantage of this mode of constitution is, that the property of the estate passes to the trustee, and is liable to be carried away by his creditors.

Proof of trust at
common law.

1517. Prior to the passing of the Act 1696, the opinion of the

(a) *Somervail v. Redfearn*, 1 June 1813, 1 Dow, 50, 5 Pat. 707, reversing M. "Personal and Real," App. No. 8; *Burns v. Lawrie's Trs.*, 7 July 1840, 2 D. 1348.

(b) *Edward v. Sheill*, 12 Feb. 1848, 10 D. 685.

Court seems to have fluctuated a good deal with respect to legal evidence in questions as to mandates and trusts; and in the case of a mandate to enter into such contract as might be proved *prout de jure*, the same sort of evidence was allowed as in the proof of the mandate itself.(c) However, a practice afterwards crept in of limiting the proof of the constitution of trusts and mandates of greater importance to writ or oath.(d) This rule of evidence ultimately received the sanction of the Legislature as regards actions of declarator of trust; but as to questions of simple mandate, the Courts have reverted to the ancient practice, and accordingly, a mandate to purchase heritable property may be proved *prout de jure*,(e) provided the title has not been taken in the name of the mandatory with consent of his constituent.(f)

1518. Although in theory writing is not required to the constitution of a trust, yet the Act 1696, cap. 25, by limiting the proof of trusts to writ or oath, has, unless in some special and a few exceptional cases, made writing practically essential. This Statute proceeds on the narrative, that the intrusting of persons without a declaration or back-bond of trust in writing was an occasion of fraud, and of many pleas and contentions. It consists of two clauses. By the second clause, with which we are alone concerned, it is enacted, "That no action of declarator of trust shall be sustained as to any deed of trust made for hereafter, except upon a declaration or back-bond of trust, lawfully subscribed by the person alleged to be the trustee, and against whom, or his heirs or assignees, the declarator shall be intended, or unless the same be referred to the oath of the party *simpliciter*." Stat. 1696, c. 25.

SECTION I.

TO WHAT TRANSACTIONS THE STATUTE APPLIES.

1519. (1) The kind of trusts referred to in the Act 1696 are those which are constituted by *ex facie* absolute disposition. The Statute does not apply to settlements of property bearing to be in trust for purposes to be afterwards declared, and still less to settlements containing *in gremio* the conditions of the conveyance.(g) Distinction between *ex facie* absolute title and disposition for purposes to be declared.

(c) 1 Bell's Com., 5th ed. p. 88; Tait on Evidence, p. 299; Dickson on Evidence, §§ 567, 573; cases in M. Dict. p. 12,397.

(d) Stair, 1, 12, 17, and cases there cited; and see cases in Br. Syn. 2577-2581.

(e) *Tweedie v. Loch*, 5 Br. Sup. 630; *Alison v. Alisons*; *Maxwell v. Maxwell*, id.

pag.; *Maclean v. Richardson*, 1 July 1834, 12 Sh. 869, *per* Lord President Hope.

(f) *Alison v. Alison*, 1771, M. 12,760.

(g) As by the terms of the English Statute of Frauds (29 Car. II., c. 8, § 7), trusts are not necessarily to be declared in writing, but only to be "manifested and proved," it is held that a subsequent acknowledg-

CHAPTER XLVII. In the class of trusts to which its provisions are applicable, the truster places the property *ex figurâ verborum* at the absolute disposal of the trustee, the limitations on the estate of the trustee being contained in the back-bond. In the case of a disposition *ex facie* in trust, the trustee is not considered to have any beneficial interest, insomuch that, even where the purposes remain undisclosed, he is in the position of a depositary taking the estate as a simple trust for behoof of the granter and his heirs.

Incompetent to refer to oath of disponent to contradict the terms of the trust.

1520. In the case of *Forsyth's Trs. v. Maclean*,^(h) an attempt was made to prove a *legatum liberationis* by the oath of a testamentary trustee as a defence to an action at his instance for payment of a debt of £100. But the notion of applying the rule of the Statute 1696 to express trusts was unanimously repudiated by the Court. "The proposal here," said Lord Colonsay, "is to prove by the oath of one trustee, that he received instructions by the truster to pay over part of the estate in the face of the written deed—to prove by one of a body of trustees, that the truster told him verbally that the estate was not to be applied in terms of the deed, but in some other way. I cannot sustain the competency of such a reference."⁽ⁱ⁾ In this case the judges were of opinion that the alleged direction could not receive effect even as a nuncupative legacy, to the extent to which such legacies are admissible, because it related to a specific subject. But it would seem, on the authority of the case of *Kelly v. Kelly*,^(k) that a bequest of a sum of money, restricted to the extent of £8, 6s. 8d., might be proved as a nuncupative legacy by the judicial admission of the executors.

Secus where trustee has the residuary interest.

1521. The case of *Hannah v. Guthrie*,^(l) (which is not touched by the decision in *Forsyth's Trs. v. M'Lean*) imports that a reference may be made to the oath of an executor, who is universal or residuary legatee, to support a trust for payment of legacies. The principle of the decision seems to be, that a trust may be engrafted upon the beneficial interest. As the oath of the residuary legatee, if affirmative of the reference, would not militate against any other interest than his own, such a reference is not open to those objections which exclude its application to the case of executors *qua* trustees. In the case of *Murray v. Lawrie's Trs.*,^(m) the subject

ment by the trustee is sufficient to rear up the trust (Lewin on Trusts, 5th ed. p. 45). Some of the English cases as to the kind of evidence admissible under the Statute will be afterwards noticed.

^(h) *Forsyth's Trs. v. Maclean*, 18 Jan. 1854, 16 D. 343.

⁽ⁱ⁾ 16 D. 346.

^(k) *Kelly v. Kelly*, 8 March 1861, 23 D. 708.

^(l) *Hannah's Legatees v. Guthrie*, 1738, M. 3837. See also *Montgomerie's Exrs.*, Petrs., 7 Feb. 1811, F.C.

^(m) *Murray v. Lawrie's Trs.*, 2 March 1827, 5 Sh. 515, N. E. 484.

of the reference was neither a trust nor a legacy, but the subsistence of a debt due by the truster. This case, which is at any rate somewhat shaken by the observations in the case of *Forsyth's Trs. v. M'Lean*, does not affect the argument on the present question. CHAPTER XLVII.

1522. Where a testator disposes an estate to persons as trustees, but no trusts are declared by the disposition, so that the beneficial interest would, upon the face of the instrument, result to the heir-at-law or next of kin, it may be asked whether it would be competent to prove a parole declaration of the purposes of the trust by the evidence of the trustees. Mr Lewin has discussed this question very fully, with reference to the terms of the English statutes regulating the authentication of trusts and wills,⁽ⁿ⁾ and he expresses an opinion, that where a trust results upon the face of a will, such verbal communings, even when amounting to a promise on the part of the devisee to execute a certain trust, are not a sufficient ground for executing a trust as against the heir-at-law. In Scotland the question has not yet been resolved by decision. Whether resulting interest may be defeated by parole evidence.

1523. Supposing the conveyance to be made *ex facie* absolutely, and a declarator of trust to be raised at the instance of the heirs, there can be little doubt that these parties would be bound by the trust purposes specified in the oath or written acknowledgment of the trustee. But where the disposition is *ex facie* in trust, though for purposes not declared, it would rather seem that the death of the truster, without leaving specific directions, raises a presumption of intestacy, and vests an absolute and indefeasible interest in his legal representatives. The opposite view would be inconsistent with the principle which requires testamentary settlements to be made in writing.^(o) It is clear that, in the case supposed, a verbal purpose of trust could not be made to affect heritage: and even as regards moveables, it is difficult to distinguish a verbal purpose from the case of a nuncupative will. Supposing such evidence to be admissible, a dishonest trustee might swear that the direction was to hold the property, or a portion of it, in trust for himself, and would thus commit a fraud with impunity. Specialty in the case of a disposition which is *ex facie* absolute.

1524. In the exceptional case of trustees and executors being also the next of kin, the danger referred to does not arise; and the case of *Hannah v. Guthrie*,^(p) already referred to, lends some countenance to the doctrine, that such trustees might be compelled by an oath of reference to disclose the trust purposes which had been verbally communicated to them. Assuming the competency of such a Same question, where trustee has the resulting interest as next of kin.

(n) Lewin on Trusts, 5th ed. p. 50.

(p) *Hannah's Legatees v. Guthrie*, 1738,

(o) *Forsyth's Trs. v. Maclean*, *supra*; M. 3837.

Smith v. Taylor, 1749, M. 6594.

CHAPTER XLVII. reference, it does not follow that those purposes would be given effect to if they were of a testamentary character. On principle, such declarations ought to be regarded as mere inchoate expressions of an intention, which is not to be regarded as final until reduced to writing.

Whether the statute applies to resulting interests under titles taken in the name of a stranger.

1525. (2) As the Statute of 1696 is applicable *in terminis* only to actions relative "to any deed of trust," its operation will not be extended to those trusts which have their origin not in the act of the grantor, but in the conduct of the grantee. Professor Bell seems to have thought that the effect of the later decisions relative to titles taken in the name of an agent or mandatory, was to do away with the exception in favour of resulting trusts altogether, contrary to his own view of the Statute.^(q) Upon this opinion Mr Dickson^(r) justly observes, that the learned Professor's view is not supported by the authorities (*Alison v. Alison* and *Duggan v. Wight*) which he cites. And we collect from the opinions of Lord Colonsay in *Leckie v. Leckie*,^(s) and of the judges of the Second Division in the case of *Marshall*,^(t) that the case of *Duggan*, although a binding authority, is not to be considered as overruling the earlier cases, which establish the doctrine, that a party putting himself in the position of a trustee by his own act, may have the trust proved against him by parole evidence.

Spreul v. Crawford.

1526. In the case of *Spreul*,^(u) the alleged trustee was in the situation of a *negotiorum gestor* or *pro tutor*, taking upon himself the management of property belonging to a minor without legal authority. While acting in this capacity, he purchased certain adjudications affecting the property, and the point decided was, that the purchase must be held to have been made for the minor's behoof. This decision might have been rested on the principle, that no person occupying a fiduciary situation can enter into any profitable transaction affecting the trust property. But it appears that the Court viewed the transaction in the light of a trust for the minor, created by the act of the trustee himself; and on this view of the character of the transaction, they held the trust to be proved by general evidence.

Modern cases.

1527. The case of *Tweedie v. Loch* ^(x) was an action against a law-agent who had purchased lands at a judicial sale on the employ-

(q) Bell's Pr. § 1994, 1 (5th ed. § 1995); Com. 843 (5th ed. i., 38); Ersk. 8, 3, 84.

(r) Dickson on Evidence, § 576.

(s) *Leckie v. Leckie*, 21 Nov. 1854, 17 D. 81.

(t) *Marshall v. Lyell*, 18 Feb. 1859, 21 D. 514.

(u) *Spreul v. Crawford*, 1741, Elchies, "Trust," No. 1. See narrative of this case in the opinion of Lord J.-C. Inglis in *Marshall's* case, 21 D. 521; *Crawford v. Crawford*, 1789, Elchies, "Trust," No. 8; *Sinclair v. Maxwell*, 1708, M. 16,186.

(x) *Tweedie v. Loch*, 5 Br. Sup. 680.

ment of the pursuer, and had taken the title in his own name. The Court allowed a proof of the pursuer's averments, but afterwards assoilzied the defender in respect of the evidence. In the cases of *Maxwell v. Maxwell*, and *Steven's Trs. v. Fraser*, where in somewhat similar circumstances the pursuer succeeded in proving his case, a decree of denuding was pronounced.^(y) On similar principles, it was held, that if a purchaser of scrip from the original allottee neglect to have the transaction entered, and the shares are in consequence registered in the name of the seller, the purchaser may vindicate his resulting interest in the shares, by proving the sale.^(z)

1528. In the cases above mentioned, the trust was created by the act of the trustee himself, without the authority of the owner of the estate. In other cases, in which there was evidence of a verbal agreement or consent that the title should be taken in the name of the alleged trustee, the rule of the Statute was applied, on the principle that in such transactions the trust was created by the act of the purchaser himself. The distinction is thus stated by Lord Glenlee in the case of *Mackay v. Ambrose*: (a) "When it is agreed that rights have been taken as the parties intended, but it is averred that this was done in trust, the Act applies. But when it is alleged that the defender was employed to buy for one party, and took titles in the name of another, that is a totally different case, and, no doubt, proof *prout de jure* might be allowed. In an unreported case, *Burns v. Morrison*, that *species facti* actually occurred."^(b) The case of *Duggan v. Wight* (c) is the leading authority with reference to purchases taken in name of the agent with consent of his constituent. In this case the purchaser was a Roman Catholic,—a circumstance which at that time disqualified him from acquiring heritable property; and it was agreed that the titles should be taken in the name of Mr Wight, his agent. The Court, after considerable conflict of opinion, decided that the proof should be limited to writ or oath; and the interlocutor was affirmed by the House of Lords, on the ground that the case fell within the rule of the Statute.

Parole evidence inadmissible where title so taken with the purchaser's consent.

1529. The case of *Marshall v. Lyell* (d) was similar in its cir-

Marshall v. Lyell.

(y) *Maxwell v. Maxwell*, 5 Br. Sup. 680; *Hume*, 846; *Boswell v. Selkraig*, 1811, *Stevens's Trs. v. Fraser*, 8 March 1836, 14 *Hume*, 850; *Mudie v. Ouchterlony*, 1766, Sh. 676; *Corbett v. Douglas*, *infra*. M. 12,403.

(z) *Lauder v. Orr*, 25 May 1853, 15 D. 670. (c) *Duggan v. Wight*, 1797, M. 12,761, 3 Paton, 610; see *Gordon's Trs. v. Lord Fife's Exr.* 5 Feb. 1862, 34 Jur. 282.

(a) *Mackay v. Ambrose*, 4 June 1829, 7 Sh. 699, 1 D. & And. 125. (d) *Marshall v. Lyell*, 18 Feb. 1856, 21 D. 514.

(b) 7 Sh. 702; see also *Skene v. Ramsay*, 1665, M. 5634; *Corbett v. Douglas*, 1808,

CHAPTER XLVII. cumstances to that of *Duggan*; and it is important to notice, that while the Court refused to grant relief to the purchaser in an action of declarator of trust, an opinion was intimated that redress might be obtained in an action of a different description, founded upon the facts which were in evidence.^(e) The purchasers in this case were the Presbytery of Paisley. The property acquired was the superiority of a church belonging to that body; and the arrangement was, that the purchase should be made by the agent for the Presbytery, and that the title was to be completed as soon as the Presbytery were in a position to pay the balance of the price. In the meantime, Mr Marshall, the agent for the Presbytery, borrowed a sum of money to complete the purchase from a friend, in whose name a disposition was taken, subject to an obligation, not by the disponent but by Mr Marshall for his behoof, "to grant when required the necessary conveyance in favour of the trustees for the church, or parties to be named by them, at their expense." On the death of the disponent an action of declarator of trust was instituted against his heir, who refused to denude, alleging that he held the property in security of previous advances made by his ancestor to Marshall. The Court found that the right of the Presbytery as beneficiaries could only be established by writ or oath, and in default of such proof, assoilzied the defender. Assuming that Marshall acted as the agent of the Presbytery, and had authority from them to take the title in the name of another party, there can be no doubt that the decision was in accordance with the precedents. If, on the other hand, the case had been that the agent exceeded his powers, the title might have been cut down; but the form of action would in that view have been a reduction, and not a declarator of trust.

Proof of trust
in cases of latent
partnership.

1530. (3) An action for the specific recovery of property may be established by other evidence than that of writ or oath, where the relation subsisting between the pursuer and defender, although of a fiduciary nature, is capable of being referred to contract. This is the principle of the decisions in actions between partners, and in some of the cases relating to security titles. For example, where shares in a joint-stock company have been entered in the register of shareholders as the property of another person, whether with the intention of creating a security or with the view of obviating objections to the admission of the real owner as a partner, the trust has

(e) 21 D. 521, *per* Lord Justice-Clerk Inglis. We presume his Lordship contemplated an action of reduction. The statutory restriction is *in terminis* applicable

only to actions of *Declarator of Trust*. See *Cullen v. Anstruther*, 18 Feb. 1856, 18 D. 592; 10 March 1857, 19 D. 674.

been held to be probative by parole evidence. (f) Money deposited in bank, (g) or invested in heritage or on real security, (h) by a partner in his own name, may, if proved to be truly the property of the partnership, be recovered by the company, even in a question with the heirs of the partner making the deposit. And where a lease was taken in the joint names of two individuals, it was held competent to prove by parole evidence that the crop and stocking belonged exclusively to one of them. (i) The same principle was applied in the case of *Knox v. Martin*. (k) Martin, one of the partners of Cochrane and Company, had made payment of a debt due by his copartner Knox, and took an assignation to the decree in his own name, on which he afterwards proceeded to raise diligence. A suspension of the charge was brought, on the ground that although the assignation was taken in Martin's name, the money had been paid out of the funds of the company, and the sum entered to the debit of the suspender in their books. The Court found the reasons of suspension proved by entries in the books of the company, made by their bookkeeper under the charger's direction. But where the ground of action is, that the business itself is a trust for behoof of latent partners, the proof must be of the nature required by the statute. (l)

1531. (4) Among the decisions relative to security contracts, the first we shall mention are the *Marquis of Queensberry's* case, and *Lindsay v. Barmcotte*. (m) In the former, the question related to the property of policies of insurance effected by the claimant's ancestor, which had been assigned to the company as a collateral security for advances. The judges had no difficulty in holding that a

Proof of trust in cases of assignment with the intention of creating a security.

(f) *Hume v. Middlemass*, 17 Nov. 1836, 15 Sh. 30; and see *Stirling v. Stirling and Robertson*, 5 July 1822, 1 Sh. 230, N.E. 218.

(g) *Baptist Churches v. Taylor*, 17 June 1841, 3 D. 1030.

(h) *Macfarlane v. Fisher*, 23 May 1837, 15 Sh. 978; *Dennistoun v. Newbigging*, 2 Dec. 1829, 8 Sh. 168.

(i) *Kilpatrick v. Kilpatrick*, 27 Nov. 1841, 4 D. 109. See also *Dingwall v. M'Combie*, 6 June 1822, 1 Sh. 463, N.E. 431, and cases *infra* (note m).

(k) *Knox v. Martin*, 12 Feb. 1850, 12 D. 719.

(l) *Currer v. Dickson*, 11 July 1857, 19 D. 991. The rule was found to apply to the case of an alleged latent interest in a lease, in *Seth v. Hain*, 14 July 1855, 17 D. 1117, and *M'Vean v. M'Vean*, 4 June 1864, 2 Macph. 1150.

(m) *Lindsay v. Barmcotte*, 19 Feb. 1851, 13 D. 718; *M. of Queensberry v. Scottish Union Ins. Co.*, 8 March 1842, 1 Bell, 183, affirming 1 D. 1203; *National Bank v. Forbes*, 3 Dec. 1858, 21 D. 79. See as to assignment of leases, *Reid v. Lyon*, 16 June 1832, 6 W. & S. 114, affirming 8 Sh. 789; *Walker's Exrs. v. Low*, 14 Nov. 1833, 12 Sh. 44; *Seth v. Hain*, 14 July 1855, 17 D. 1117. As to dispositions of land, *Robertson v. Duff*, 14 Jan. 1840, 2 D. 279; *M'Lelland v. Bank of Scotland*, 27 Feb. 1857, 19 D. 574; *Leckie v. Leckie*, *infra*; *Hawarden v. Dunlop*, 31 May 1861, 28 D. 923. As to delivery-orders, etc., *Hamilton v. Western Bank*, 13 Dec. 1856, 19 D. 152; *Hamilton's Exrs. v. Hope*, *infra*; Bell's Pr. § 1367.

CHAPTER XLVII. resulting trust might be established in such circumstances, independently of the Statute 1696. In *Lindsay's* case, Lord Cuninghame observed: "I agree with Lord Mackenzie in holding that this is not a proper trust, to which the reclaimer endeavours to assimilate it for the purpose of limiting the proof. The present was, from the first, a case of joint obligation rather than of trust. In cases of the former class, it is always competent to prove by facts, or even in part by parole, for whose behoof the transaction has been entered into." (n) In *Hamilton's Executors v. Hope*, the pursuer's ancestor had assigned all his furniture and moveable effects to a trustee, ostensibly in security of debt, but in reality to protect the property from diligence. In an action of denuding, instituted against the executors-creditors of the trustee, the Court found that the existence of debt was not sufficiently proved, and decerned for payment of the proceeds of the property to the truster's representatives. (o)

Case of a general security in the form of *ex facie* absolute disposition.

1532. The law of evidence with reference to securities conceived in the form of *ex facie* absolute dispositions, was very carefully considered by the First Division in the recent cases of *Leckie, Walker*, and *M'Clelland*. (p) Such dispositions are frequently used for the purpose of creating an indefinite security for future advances, the intention being to confer upon the disponent all the rights of an absolute proprietor, subject to no other condition than that of an obligation to denude on repayment of advances. In such a case, it has been laid down, that the debtor has no action to restrict the security to a trust, although he may ultimately be entitled to the reversionary interest. His right is simply a personal and contingent right to demand a reconveyance, upon payment of all advances made subsequent to the disposition. (q)

Action of accounting.

1533. In the case of *Walker v. Buchanan, Kennedy, & Co.*, in which it was alleged that the debt had been extinguished by intromissions with an annuity conveyed by *ex facie* absolute assignation, the Court found that the defenders were bound to hold count and reckoning, on the footing that the assignation was in security. The case was complicated by the allegation that a back-letter, granted at the date of the assignation, had been accidentally destroyed: the defender, on the other hand, maintaining that the letter had been given up with the intention of converting the security into an abso-

(n) 13 D. 725. See *Smollett v. Bell*, 1793, M. 12,354, referred to by Lord Cuninghame, *supra*.

(o) *Hamilton's Exrs. v. Hope*, 26 March 1853, 15 D. 595.

(p) *Leckie v. Leckie*, 21 Nov. 1854. 17

D. 77, 81; *Walker v. Buchanan, Kennedy, & Co.*, *infra*.

(q) *M'Clelland v. Bank of Scotland*, 27 Feb. 1857, 19 D. 574; *Brough v. Jolly*, 1793, M. 2585; and see cases cited in

Robertson v. Duff, 14 Jan. 1840, 2 D. 279.

lute assignation. But the judgment of the majority of the Court, as delivered by Lord Ivory, proceeded rather on the nature of the transaction as admitted by the defender, which, as they held, conferred an equitable right of reversion on the pursuer.^(r)

1534. It appears to be doubtful whether an *ex facie* absolute disposition, proved to have been granted in security of future advances, can be made available as a security for sums advanced by the creditor anterior to the date of the disposition, without a special stipulation.^(s) If a fund is assigned in security of a specific debt, and the amount of the debt is mentioned in the deed constituting the security, the creditor has no general security for advances.^(t)

Whether an *ex facie* absolute disposition secures past advances.

1535. (5) Fraud in the constitution of the trust will also take the case out of the rule of the Statute. "It seems almost unnecessary," said Lord Justice-Clerk Inglis in the case of *Marshall v. Lyell*,^(u) "to add, that while fraud in the constitution of the title will form a good ground, not for a declarator of trust, but for an action of reduction, and may be proved *prout de jure*, fraud which consists merely in denying the existence of the trust alleged, will not prevent the operation of the Statute; for every trustee who denies the existence of the trust is necessarily guilty of fraud." The case of a mandatory fraudulently appropriating the property of his constituent is an instance in point.

Proof of trust in action laid on fraud leading to the transaction.

1536. In addition to the decisions having relation to the interests of third parties, to be immediately noticed, we may refer to a case^(v) where a widower alleged that money deposited in bank in name of his wife's sister belonged to his wife. In this case the Court allowed a proof before answer, and were of opinion that, the averment being of a conspiracy between the wife and her mother and sister to defeat the husband's *jus mariti*, the Act 1696 did not apply. The mere fact that a deed of conveyance contains a false narrative of a price paid, when it is in reality gratuitous, does not create such a presumption of fraud as will entitle the granter to a proof at large in an action of declarator.^(x)

Chalmers v. Chalmers.

1537. Mr Dickson^(y) lays down, on the authority of Forsyth, and of a report which occupies a single line in the Dictionary,^(z) that where the right to a moveable estate is not constituted by writing,

Proof of trusts of moveables constituted by verbal declaration.

^(r) *Walker v. Buchanan, Kennedy, & Co.*, 11 Dec. 1857, 20 D. 259, 263.

^(s) *Robertson v. Duff*, 14 Jan. 1840, 2 D. 279.

^(t) *National Bank v. Forbes*, 3 Dec. 1858, 21 D. 79; *Hamilton v. Western Bank*, 13 Dec. 1856, 19 D. 152.

^(u) 21 D. 521.

^(v) *Harper v. Hume*, 16 July 1850, 22 Jur. 577.

^(x) *Chalmers v. Chalmers*, 13 June 1845, 7 D. 865.

^(y) Dickson on Evidence, § 575; Forsyth on Trusts, p. 54.

^(z) *L. Strathnaver v. M'Beath*, 1731, M. 12,757.

CHAPTER XLVII. witnesses are admissible to prove that it is held in trust. This view seems to be in accordance with the terms of the Statute, as limited to "deeds of trust." The numerous cases as to gifts *intuitu mortis* which have lately occurred, and in which it has been the practice to direct an issue to inquire whether the subject was a donation by the deceased, may perhaps be referred to this exception to the rule.

SECTION II.

EVIDENCE REQUIRED BY THE STATUTE.

Trustee's signature is held sufficient evidence.

1538. Under the Statute, the proper evidence of a trust is a back-bond or other authentic writing, signed by the trustee, containing the conditions of the trust. It has never been considered essential that the acknowledgment should be of a formal character. In the case of *Taylor v. Crawford*,^(a) a letter acknowledging the terms upon which money had been advanced, and signed by the trustee, the words "I agree to the above" being prefixed to the subscription, was held to be a sufficient compliance with the terms of the Statute. All the judges were of opinion that the signature of the trustee would be a lawful subscription in terms of the Statute, although the document were not holograph or tested; and to mark their opinion on this point, a special finding was inserted in the interlocutor^(b), that "if the signatures 'William Crawford' to the letter founded on are genuine, and the words 'I agree to the above' are holograph of him, or if the signatures are genuine, the said letter was a sufficient declaration of trust."^(c) Upon this decision Mr Dickson^(d) remarks, that the subscription would have been good at common law, on the principle that the delivery of the trust-property constitutes *rei interventus*; an opinion which has received an indirect confirmation from the decision in the case of the *Church of England Insurance Co. v. Wink*.^(e)

Recital in a deed or contract is evidence under the Statute.

1539. In another case, where the titles to property were taken

(a) *Taylor v. Crawford*, 14 Nov. 1833, 12 Sh. 89.

(b) 12 Sh. 42. See *Wood, Small, & Co. v. Spence*, 14 Nov. 1833, 12 Sh. 42; *Montgomerie's Exrs.*, Petrs., 7 Feb. 1811, F.C. *Mackay v. Ambrose*, 4 June 1829, 7 Sh. 699, 1 D. & And. 125.

(c) A signed letter is a sufficient declaration of trust under the English Statute of Frauds. In *Childers v. Childers*, 1 De Gex & J. 482, and 26 L. J. Ch. 643, 748, a father conveyed property to his son for the

purpose of giving him a qualification under a local Act of Parliament. This purpose was expressed in a letter to the registrar, and the Lords Justices thought this was sufficient to show that there was no intention of conferring the beneficial interest, but merely a qualification. See also *Morton v. Tewart*, 2 Y. & C. Ch. Ca. 67; *Bentley v. Mackay*, 15 Beav. 12.

(d) Dickson on Evidence, § 582.

(e) *Church of England Ins. Co. v. Wink*, 17 July 1857, 19 D. 1079.

in the name of one of the partners of a company, a trust in favour of the copartnery was held to be established by evidence deduced from a variety of expressions in documents under the hand of the partners ; and, among others, by a description in a contract of copartnery of the parties "as *proprietors* of the field and ground," by bills granted for the price, and by several docquetted statements and accounts which were pronounced to be constructively writs of the defender.^(f) In the case of *Watson v. Johnston*,^(g) a recital, in an heritable bond to a third party, of a trust-deed which had been executed by the granter for payment of his debts, was held by Lord Campbell to constitute legal evidence of the trust, in a question with the granter's creditors, to the effect of eliding prescription.

1540. We proceed to the consideration of a question as to which the law must be admitted to be somewhat uncertain and unsatisfactory. We mean the question as to the extent to which unsigned memoranda or entries in account books, together with real evidence, are admissible as equivalents to the statutory back-bond of trust. We have seen that an acknowledgment of trust is good, although not probative. And it would appear to be now virtually settled, that even the signature of the trustee may be dispensed with, provided the acknowledgment is distinct and unequivocal. This relaxation of the rule is properly admitted in the case of trusts established by entries in business books, the authenticity of which does not depend on subscription.^(h)

Unsigned entries in account books, whether equivalent to a declaration under the Statute.

1541. "I am very far from thinking," said Lord Justice-Clerk Hope, in the case of *Seth v. Hain*,⁽ⁱ⁾ "that entries in business books, if unequivocal and distinct, may not be most competent evidence of a trust in the property, of the management and application of the proceeds of which such books are the record. In such a case, I do not think that the evidence would be incompetent because the books did not, in set terms and directly, contain a declaration of trust. Neither am I prepared to say that there must be a signature in such books, of the party keeping them."^(k) To the same effect is the opinion of Lord Wood, who says, "I am of opinion, in the first place, that the books of the alleged trustee, holograph of himself, amount to writ of party; that they are his writ, although there may be no subscription to the entries or accounts in the books ; and

Conflict of judicial opinion on the question.

^(f) *Macfarlane v. Fisher*, 23 May 1837, 15 Sh. 978.

^(h) *Stair*, 4, 42, 6.

^(g) *Watson v. Johnston*, 10 April 1848, 6 Bell, 245. A recital is also evidence of trust under the English statute; *Moorcroft v. Dowding*, 2 P. W. 814; *Deg v. Deg*, 2 P. W. 412.

⁽ⁱ⁾ *Seth v. Hain*, 14 July 1855, 17 D. 1117; *Reid v. Lyon*, 16 June 1832, 6 W. & S. 114, affirming 8 Sh. 789; *Currer v. Dickson*, 11 July 1857, 19 D. 991.

^(k) 17 D. 1124.

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that, as being his writ, they form evidence which may be competently tendered in proof of trust, under the Act 1696. And, in the second place, that they will be sufficient to prove it, although they contain no positive or direct admission of trust in so many words, if their language is clearly and unequivocally referable to the existence of a trust, and manifestly does not admit of being explained in consistency with the party holding in any other character than that of a trustee.”(l) Upon these *dicta*, Lord Deas remarked,—“Observations were made in that case (*Seth v. Hain*) to the effect that it was not essential that the writ should be subscribed by the trustee. But there was no decision to that effect, either in that case or in any other that can now be relied on. That entries in books, and even facts and circumstances, may be taken in connection with, and as explanatory of, a signed writing, I do not doubt; but that these will do alone, I am not prepared to affirm. If, however, they will do at all, they must be clear and conclusive.”(m)

Entries in the handwriting of the trustee may be evidence.

Extent of the truster's reversionary interest, how ascertained in security transactions.

1542. Keeping in view the import of the decisions in the above-mentioned cases, the correct view would appear to be, that the *existence* of a trust may be proved by improbative letters or memoranda, authenticated by the signature of the trustee, or by the books of the trustee kept by himself; subscription in the latter case being dispensed with from the necessity of the case; but that real evidence, or “facts and circumstances,” are only admissible to prove the *terms* of the transaction.(n) For example, there can be no doubt, that if the written declaration admits that the estate is held in security of advances, or until payment of the price of the property, parole proof will be allowed as to the extent of the obligation constituted by the declaration. Such is in substance the import of the decisions usually cited on the subject of proof by facts and circumstances.(o) And, on the same principle, where property is held for behoof of a religious society or other similar institution, an inquiry may take place into the rules and practice of the association, which, in this case, constitute the conditions of the trust.(p) There are not wanting, however, judicial *dicta* which would give to the evidence of facts and circumstances a somewhat more extended application. For example, in the case of *Chalmers*,(q) Lord Fullerton, with whom

(l) 17 D. 1125.

Nov. 1833, 12 Sh. 42; *Miller v. Oliphant*, 7 Mar. 1843, 5 D. 856.

(m) *Walker v. Buchanan, Kennedy, & Co.*, 11 Dec. 1857, 20 D. 269.

(p) See *Davidson v. Aikman*, 1805, M. 14,584, 1 Dow, 1, 2 Bligh, 529.

(n) In *Morton v. Tewart*, 2 Y. & C. Ch. Ca. 67, Lord J. Knight Bruce admitted parole evidence to explain the cause of granting and the weight to be attached to a letter adduced in support of a trust.

(q) *Chalmers v. Chalmers*, 13 June 1845, 7 D. 870. See also *Lindsay v. Barmcotte*, 19 Feb. 1851, 13 D. 725, per Lord Cunningham; and *Smollett v. Bell*, 1793, M. 12,854.

(o) *Wood, Small, & Co. v. Spence*. 14

Lord Jeffrey concurred, remarked:—"It is said the facts and circumstances admitted are sufficient to prove a trust. Now, I rather think that the cases do bear out this,—that admitted facts and circumstances may supply the want of a positive declaration of trust; but then these facts and circumstances must constitute real evidence of the conduct of the party in relation to the matter, not to be explained in any other way than as an admission that he holds in trust."(*r*)

1543. A document purporting to be a declaration of trust will not be received in evidence if it is vitiated *in substantialibus*. Thus, where a party infert on an *ex facie* absolute disposition in 1826 had granted a missive, binding himself to reconvey at any term prior to 1846, and the word forty, being part of the date of redemption, was written on an erasure, the Lord Ordinary, by his interlocutor, which was adhered to, found, "that the said document does not afford a valid ground of action, and that it is not thereby instructed that the pursuer was entitled to re-acquire the subjects at the date of the present action."(*s*)

Effect of vitiation in *essentialibus* of a declaration of trust.

1544. In the case of a declaration of trust being lost or fraudulently destroyed, its contents may be proved by secondary evidence; and it does not seem to be necessary to lead a proving of the tenor. In the case of *Kennoway v. Ainslie*,(*t*) which was a reduction of a conveyance by the trustee as in breach of trust, it was alleged that the back-bond had been delivered to the trustee for a temporary purpose, and retained by him. A proof having been allowed, their Lordships held "that the allegiance was not of a trust to be proved by witnesses, but of the fraudulent destroying of a back-bond, and that this is a fact proveable by witnesses." And accordingly, they "found the reasons of reduction relevant and proved." The opinions of the judges in the cases of *Chalmers*(*u*) and *Walker*(*x*) may be consulted on this point of practice.

Tenor of missing declaration may be proved.

1545. A trust may, of course, be inferred from the judicial admissions of the defender on record, subject to the ordinary rule of construction, that such admissions are to be taken with the qualifications annexed to them.(*y*) And an averment of trust made by

Judicial acknowledgment of trust equivalent to a declaration or back-bond.

(*r*) Under the English statute (*ante*, § 1519) it appears that not only the fact of the trust, but also the terms of it, must be supported by evidence under signature; but it was held by Lord Alvanley, in *Forster v. Hale*, 3 Ves. 696, that the terms of the trust might be collected from an unsigned paper sufficiently connected with the signed declaration. See Sugd. "Vendors and Purchasers," ch. 8, § 2.

(*s*) *Kirkwood v. Patrick*, 25 June 1847, 9 D. 1368.

(*t*) *Kennoway v. Ainslie*, 1752, M. 12,488.

(*u*) *Chalmers v. Chalmers*, 7 D. 869.

(*x*) *Walker v. Buchanan*, 20 D. 269, *per* Lord Deas.

(*y*) *Adamson v. Adamson*, 29 Jan. 1834, 12 Sh. 359; *Taylor v. Crawford*, 14 Nov. 1833, 12 Sh. 41, *per* Lord President Hope.

CHAPTER XLVII. a trustee for his own interest, will be available to other claimants in the position of contradictors to him.(z) We have already seen that admissions, to the effect that an absolute disposition was intended to constitute a security for advances, will enable the pursuer to get into an accounting, but will not entitle him to obtain a decree of declarator of trust.(a) The same principle would probably be held to govern the construction of admissions made by the trustee on a reference to oath.(b) In point of principle, it would seem that a declaration emitted upon deathbed is not binding upon the trustee's heir; and it was so held in a case which occurred prior to the date of the Statute, of which a full report has been preserved.(c)

Trust cannot be proved by oath of bankrupt after sequestration.

1546. The effect of bankruptcy, in excluding evidence subsequent in date to the sequestration, was very carefully considered in the case of *Mein v. Towers*; (d) and it was decided, that a reference to the oath of the bankrupt *in causa* was incompetent, in an action directed against the trustee for the recovery of a specific subject, alleged to be trust property. It will be observed that the present Bankruptcy Act(e) vests in the trustee the whole property of the debtor as at the date of the sequestration, subject, in the case of moveable property, "to such preferable securities as existed at the date of the sequestration, and are not now null or reducible;" while in the case of heritable property, his right is limited "to the extent of the interest in the estate which the bankrupt might legally convey or the creditors attach." This clause clearly excludes the possibility of establishing a latent trust after bankruptcy; and it has been settled by the case of *Adam v. Maclachlan*, that a reference to the oath of the bankrupt is incompetent even to the extent of constituting a claim in bankruptcy.(f) The principle of this decision would equally exclude the bankrupt's written declarations, if subsequent in date to the sequestration; if prior in date, they would, of course, be admissible in proof of a claim, though they would not confer a preference in bankruptcy.

(z) *Lindsay v. Giles*, 27 Feb. 1844, 6 D. 771.

(d) *Mein v. Towers*, 11 July 1829, 7 Sh. 902.

(a) *Leckie v. Leckie*, 17 D. 77; *Walker's* case, 20 D. 259, cited above.

(e) 19 and 20 Vict. c. 79, § 102.

(b) *Forbes v. Culloden*, 1712, M. 13,236.

(f) *Adam v. Maclachlan*, 29 Jan. 1847, 9 D. 560, overruling *Blair v. Balfour*, 1745, M. 12,473. See also Bankton, 4, 32, 5; Ersk. 4, 2, 10; *Thomson v. Duncan*, 10 July 1855, 17 D. 1081.

(c) *Paton v. Stirling*, 1671, M. 12,586; and *Crawford v. Bell*, 1687, M. 12,591, a case of verbal declaration. And see cases as to alterations executed by the truster on deathbed; *supra*, chapter 9.

SECTION III.

EVIDENCE IN QUESTIONS WITH THIRD PARTIES.

1547. Notwithstanding the doubts expressed by Mr Dickson (*g*) and Mr Forsyth, (*h*) on the authority of a *dictum* of Lord Gillies, (*i*) we must hold it to be settled law, that the Act 1696, cap. 25, does not apply where a latent trust is sought to be proved by a person who was not a party to its constitution, but who has an interest in proving its existence in order to make good his claim against the truster or the trustee.

1548. The case of *Elibank v. Hamilton*, (*k*) in which the doctrine here stated was laid down, has been supposed to be founded to some extent upon allegations of fraud; but we do not find that those considerations materially affected the decision of the Court. Lord Alloway is reported as having said, "I do not think that the Act 1696 can at all apply as to the mode of proving the alleged trust. If the question was between Mr Hamilton and his brother [the truster and trustee] it would apply, but not here; and I think the pursuer is entitled to a proof of his averments *prout de jure*." Lord Glenlee said,—“As to the mode of establishing the alleged trust in the person of his brother, I am satisfied that it is only in questions between the truster and trustee that the Act 1696 applies.” Lord Pitmilley concurred; and the Lord Justice-Clerk Boyle observed,—“As to the Act 1696, I am quite satisfied that it does not apply here, and does not restrict parties to the mode of proof there specified, as this is not a declarator of trust by the truster against the trustee.” (*l*)

1549. In the case of *Scott v. Miller*, (*m*) Lord President Hope observed,—“If any third party has an interest to prove the existence of a trust, notwithstanding an *ex facie* ownership, the Statute does not apply to him. It does not constrain him to prove trust only by adducing a writ which he had not originally any means of taking at the constitution of the trust, or by means of the oath of a party whom he had never trusted. A third party, whose interest it is to unveil the true character of a simulate transaction, and to prove the existence of a trust, notwithstanding an appearance of ownership, has a right to establish this *prout de jure*.” (*n*) This

(*g*) Dickson on Evidence, § 579.(*l*) 6 Sh. 72.(*h*) Forsyth on Trusts, p. 62.(*m*) *Scott v. Miller*, 16 Nov. 1882, 11 Sh.(*i*) *Scott v. Miller*, *infra*.

21.

(*k*) *Elibank v. Hamilton*, 16 Nov. 1827,(*n*) 11 Sh. 26.

6 Sh. 69.

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reasoning appears to us to be conclusive; and although it is true that Lord Gillies dissented from the President's opinion, in a passage which is quoted with approbation by Mr Forsyth, it does not appear that the rule of the Statute ever has been applied to cases of the class under consideration.

*Middleton v.
Rutherglen.
Wink v. Speirs.*

1550. Accordingly, where a party was sued by an assignee in trust upon a bill which the respondent alleged that he had already paid to the cedent, the Court were unanimously of opinion that the fiduciary character of the assignation might be established by a proof at large, for the purpose of fixing the defence of payment on the assignee. Lord Justice-Clerk Inglis observed,—“ I am of opinion that the party here is not at all limited by the provisions of the Act 1696, because this is not a question between a truster or one in his right, and a trustee or one in his right; but between an alleged trustee and a third party, who was a debtor of the truster, and has been discharged by the truster. The Statute does not apply to this case in its terms, nor has it ever been extended to such a case by any decision of this Court.”(o) In a recent case parole evidence was held admissible, in an action at the instance of the trustee on the granter's sequestrated estate, to prove that an *ex facie* absolute conveyance of certain heritable subjects to a confident person was a latent trust for behoof of the bankrupt, and to exclude the diligence of his creditors.(p)

Parole evidence
in actions of
relief.

1551. It was decided in the case of *Murdoch v. Wylie*,(q) that parole evidence is admissible to prove a trust in an action by a trustee seeking relief against his constituent. The decision is in accordance with the terms of the Statute, which only applies to cases where the trustee is the party “against whom, or his heirs or assignees, the declarator shall be intended.”

(o) *Middleton v. Rutherglen*, 8 Feb. 1861, 23 D. 526; see 528. The distinction is further illustrated by the decisions in relation to latent trusts for electoral purposes, where parole evidence was held to be competent to prove an objection to a claim (*Ferries v. Morehead*, 1790, M. 8772), but not in an action at the instance of the true

proprietor to vindicate his right to the property; *Douglas v. Dalrymple*, 1770, 2 Pat. 187.

(p) *Wink (Speirs Tr.) v. Speirs*, 3 Dec. 1867, 6 Macph. 77

(q) *Murdoch v. Wylie*, 8 March 1832, 10 Sh. 445.

CHAPTER XLVIII.

OF RESULTING TRUSTS UNDER WILLS AND DISPOSITIONS.

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| <p>I. <i>Lapsed Succession.</i></p> <p>II. <i>Resulting Interests under Charitable Trusts.</i></p> | <p>III. <i>Resulting Interests under ex facie absolute Conveyances.</i></p> |
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1552. An interest is said to *result* to the truster or his heirs, in relation to estate which is vested in trustees under a settlement which does not contain any effectual disposition of the beneficial interest. Such resulting interests or resulting trusts may be considered as arising either by operation of law, or by implication from the act of the truster himself, who, in disposing of the legal estate to trustees, is understood to reserve the beneficial interest to himself, if he does not otherwise dispose of it.

Resulting trusts distinguished from constructive.

1553. A convenient division of resulting trusts is that suggested by the nature of the instrument under which the right arises. Upon this principle of division we may distinguish, *first*, resulting trusts of lapsed interests under wills and testamentary dispositions; *secondly*, resulting interests under charitable trusts; and *thirdly*, resulting trusts arising upon securities taken in the name of heirs or confidential persons, with the intention of reserving the beneficial interest. (a)

Division of resulting trusts.

The subject of the third sub-division of the chapter has been partly anticipated, in treating of the proof of trust under the Statute; but, in order to a complete view of the law of resulting trusts, it is necessary to examine the authorities in their relations to the doctrine under consideration.

(a) To both classes of trusts the term "Resulting Trust" has been held applicable by authorities of the greatest eminence in Scotland. For example, in *M'Leish's Tr. v. M'Leish*, Lord Moncreiff said:—"If the nature of the trust purposes and the state of the property be such that any part of the trust-funds stands legally undisposed of, there may then be a *resulting trust* in the trustees for the heirs-at-law to that extent;" 8 D. 924.

See also *Allan v. Glasgow's Trs.*, 4 D. 509; *Boyle v. Earl of Glasgow's Trs.*, 20 D. 943, *per* Lord Colonsay. In *Lauder v. Orr*, where the question related to the right to a dividend upon shares alleged to have been purchased by the defenders, but which were entered in the register in the pursuer's name; the same judge observed, that the pursuer "having received from them the price, cannot withhold from them the shares, or the *resulting benefits*;" 15 D. 677.

SECTION I.

LAPSED SUCCESSION.

Lapsed succession results to the heir-at-law or personal representatives.

1554. I. IN WHAT WAY A LAPSE OR FAILURE TO DISPOSE MAY ARISE.—Where, in a trust-disposition, or other testamentary instrument, it is apparent from the form of the conveyance, or from the nature of the purposes expressly or impliedly declared in it, that the disponent was intended to take only the legal estate, the beneficial interest, or so much of it as remains undisposed of, will result, in the case of heritable estate, to the trustee and his heirs; and, in the case of personalty, to his personal representatives. (b) A familiar example of the principle is the case of a will in favour of an individual, not containing a destination to heirs; in which case, if the beneficiary predecease the testator, a resulting trust arises for the benefit of the testator's legal representative.

Accessions follow the principal estate.

1555. As a general rule, the interest of money, and the profits and accessions accruing to the trust-estate, are subject to the same trusts as the principal fund; and therefore, where a policy of insurance was assigned to creditors, with the view of providing a fund for the extinction of a debt due by the assured equal to the sum in the policy,—on the death of the assured, it was held that certain bonuses, which had accrued on the policy, amounting to the sum of £1100, resulted to the truster's executors. (c) As a trustee is bound to know the nature of the title on which he possesses, and to preserve the rents for the use of the beneficiaries, he can have no claim to the character of a *bona fide* possessor, and must account for *fruges perceptæ et consumptæ*, as well as for rents uplifted or reduced into possession. (d)

(b) The reversionary interest of a settlor constituting a trust by deed *inter vivos*, stands on the footing of his original titles; it is adjudgeable by his creditors, and is capable of being made the subject of disposition; *Campbell v. Edderline's Creditor*, 1801, M. "Adjudication," App. No. 11; 1 Bell's Com., 5th ed. 86; Pr. § 1996. The following statements of the rights of posterior creditors claiming the reversion, is taken from page 36 of the 1st Vol. of the Commentaries:—"1. If the trust is such as to leave no fee in the truster, his subsequent creditors will have no share in the trust-estate. 2. Where a trust is created for payment of prior debts, and the conveyance of the residue to certain persons, in such shares as the truster shall appoint, it is held that subsequent credi-

tors may be introduced by a supplementary trust-deed, or that the trustees making advances to the truster have right to withhold the estate till indemnified. And so, 3. A trust created for the purpose of paying off debts, and raising money for certain purposes, was held to leave in the truster so much of his original estate as to authorise the trustees to take credit in accounting for having, in the course of their administration, paid a creditor holding certain bills due by the truster."

(c) *Marquis of Queensberry v. Scottish Union Ins. Co.*, 1 D. 1208; *Shand v. Blaikie*, 21 D. 878.

(d) *Whyte v. Ballantyne*, 20 Jan. 1825, 3 Sh. 451, N. E. 315; *York Buildings Co. v. Mackenzie*, 3 Pat. 378, 579.

1556. With the view of providing against the occurrence of a case of partial intestacy, substitutions to the heirs of legatees and disponees, or to the testator's own heirs, are usually introduced into testamentary destinations. Such substitutions ought to be introduced even into residuary destinations, where a trust of lengthened duration is contemplated. It may happen that a residuary legatee or heir of provision has no heirs; in this case, also, the property will fall as lapsed succession to the heirs of the testator. The Crown's interest, as *ultimus hæres* of a beneficiary, is excluded by a destination over to the testator's own lawful heirs;(e) which will give a claim to heirs existing at the time of his death, or their lawful representatives.(f)

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Lapse avoided by conditional institution of heirs.

1557. A resulting interest may also arise through the operation of the 47th and 48th sections of the Act 11 and 12 Vict., cap. 36, where a party is seised of heritable property, upon trust to secure a liferent or other limited interest to a party of full age born after the date of the settlement. In this case the fee-simple estate results to the party in possession of the usufructuary interest, and the ulterior destinations are void. Again, the beneficial interest may be said to result when a settlement is set aside on grounds extrinsic to the deed; for the disponee is bound, if he enters into possession, to account for the proceeds to the settlor's heirs. The grantee under a will or settlement will not be permitted to retain the beneficial interest, where the settlement, or any ratification of it which he may have obtained from the heir,(g) is vitiated by fraud or essential error. In the ordinary case, fraud operates by sweeping away the deed altogether, thereby leaving the estate to be taken up by the heir *ab intestato*. But there is authority for holding, that where the fraud has relation to the interest of an individual beneficiary (e.g., if a person, without the authority of the testator, should insert his own name, or the name of another person, in a destination), the person whose interests are prejudiced by the fraud may demand a conveyance in restitution.(h)

Resulting trusts under the Entail Amendment Act.

Resulting interest in profits when disponee's title reduced.

1558. Where the granter of a deed has himself contemplated a fraud upon the law, it would seem the disposition or security will

Effect of fraud upon the claim of the heir.

(e) *Henderson v. Dougall*, 12 Feb. 1841, 3 D. 548.

S. 346, reversing 6 Sh. 479; but see *Kyle v. Allan*, 23 Feb. 1882, 11 Sh. 87.

(f) *Maxwell v. Wylie*, 25 May 1837, 15 Sh. 1005.

(h) *Ferguson v. Munro*, 5 March 1823, 1 Sh. Ap. Ca. 394; *Chalmers v. Taylor*, 1699, M. 15,930; *Sinclair v. Maxwell*, 1708, M. 16,186; and see *Buchanan v. Paterson*, 1704, M. 15,982; *Scott v. Wilson*, 15 July 1825, 3 Mur. 523.

(g) *Murray v. Murray*, 21 Jan. 1826, 4 Sh. 374, N. E. 377; *Leiper v. Cochrane*, 9 July 1822, 1 Sh. 552, N. E. 506; *Fraser v. Fraser*, 7 Nov. 1834, 13 Sh. 708; *Ewen v. Mags. of Montrose*, 17 Nov. 1830, 4 W. &

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be absolute, unless the grantee voluntarily admit the trust.(i) In *Craig v. Jack* (k) the question was raised, whether a grantee under a disposition reducible *ex capite lecti* was entitled to hold the estate in security, until he should be relieved of advances made by him to the granter. It would seem that, in such a case, the Court would at all events sist procedure in the action of reduction, to allow time for the institution of proceedings for constituting the debt against the testamentary estate.(l)

Lapse resulting from a failure to dispose of the beneficial interest.

1559. An intention to exclude the grantee of a settlement from the beneficial interest, may, on the one hand, be deduced from the express terms of the deed; as where there is a testamentary disposition in trust to certain persons, for purposes to be afterwards declared, and the truster dies without executing any deed of declaration; (m) or upon trust for purposes which are either set aside by the Court as inextricable (n) or unlawful, (o) or which do not exhaust the estate, (p) or upon trust to distribute estate according to a certain discretion to be exercised by a trustee, who dies without having distributed the estate; (q) or upon trust for purposes which lapse by the failure of the beneficiary, (r) or in consequence of his being excluded by the law of approbate and reprobate. (s) On the other hand, although the whole interest in property conveyed by deed (t) or bequest (u) has not been impressed with the character of a trust in so many words, yet if a trust is declared of any part of the subject of conveyance, and nothing is said as to the residue, the creation of the partial trust being manifestly the object of the conveyance, the beneficial interest which the truster has left unappropriated, will result to himself or his representatives.

(i) *Bruce v. Grant*, 27 Feb. 1839, 1 D. 583; *Thomson v. Dove*, 16 Feb. 1811, F.C. 3 Macph. H. L. 59.

(k) *Craig v. Jack*, 21 May 1857, 19 D. 747.

(l) See opinion in *Craig v. Jack*, *supra*.

(m) *Sinclair v. Trail*, 27 Feb. 1840, 2 D. 694; but see *Alston v. Marshall*, 2 July 1838, 11 Sh. 868; *Irvine v. Bannerman*, 20 June 1844, 6 D. 1178.

(n) Bell's Pr. § 1884; *Mason v. Skinner*, 6 March 1844, 16 Jur. 422, and sequel of *M'Nair's* case as there stated.

(o) *Pursell v. Elder*, 24 March 1865, 8 Macph. H. L. 59, 4 Macq. 992; *Lord v. Colvin*, 7 Dec. 1860, 23 D. 111; *Keith's Trs. v. Keith*, 17 July 1857, 19 D. 1040.

(p) *Macfarlane v. Cranstoun*, 18 Dec. 1828, 2 Sh. 578; *Wylie v. Enohin*, 29 L. J. Ch. 841; and on appeal, 31 L. J. 402.

(q) *Dundas v. Dundas*, 27 Jan. 1837, 15 Sh. 427; *Pursell v. Elder*, 25 Nov.

1856, 19 D. 71; affirmed 24 March 1865, 3 Macph. H. L. 59.

(r) *Torrie v. Munsie*, 31 May 1832, 10 Sh. 597; *Nasmyth v. Hare*, 17 Feb. 1819, F.C.; *Lord v. Colvin*, (2d case) 15 July 1865, 3 Macph. 1083.

(s) *Nisbet's Trs. v. Nisbet*, 5 Dec. 1851, 14 D. 145. See *Peat v. Peat*, 14 Feb. 1839, 1 D. 508; *Leny v. Leny*, 28 June 1860, 22 D. 1272.

(t) *Finnie v. Commrs. of Treasury*, 30 Nov. 1836, 15 Sh. 165; *Henderson v. M'Culloch*, 12 June 1839, 1 D. 927; *Hamilton v. Gordon*, 1724, M. 6588; *Blackwood v. Dykes*, 11 Sh. 443.

(u) *Soutar v. M'Grugar*, 22 Jan. 1801, F.C.; *Ramsay v. Anderson*, 26 Feb. 1836, 14 Sh. 570; *Miller v. Black's Trs.*, 14 July 1837, 2 S. & M.L. 866; *M'Leish's Trs. v. M'Leish*, 25 May 1841, 3 D. 914.

1560. II. WHAT WORDS GIVE A BENEFICIAL INTEREST TO THE GRANTEE. CHAP. XVIII.

GRANTEE.—It is necessary, in considering this branch of our subject, to distinguish the cases of trust-settlements in which the purposes are wholly or partially undeclared, and *ex facie* absolute dispositions burdened with legacies. In the former case, the undisposed residue of the estate results to the grantor's heirs; in the latter, the inference arises that the residue is given to the donee beneficially, and, indeed, he is entitled to it by the operation of the Statute 1696, cap. 25, independently of the apparent intention. Under the usual style of a Scotch trust-deed, by which the act of disposition is qualified by the restrictive words "for ends, uses, and purposes," the trustees are effectually precluded from laying claim to any beneficial interest, whether residuary, lapsed, or undisposed of; insomuch that, under the former law, trust donees, who were also executors, were held to have no claim to a share of the undisposed-of executry under the Act 1617, cap. 14.(x) And even where a sum of money is declared to be "payable to the trustees," the presumption is that they are to receive it in their fiduciary capacity; for a legacy to trustees, or allowance to them for time and trouble, can only be constituted by proper words of donation or bequest.(y)

Distinction between trust for purposes undeclared, and *ex facie* absolute conveyance.

1561. In the construction of wills drawn by non-professional persons, great difficulty is sometimes experienced in determining whether the estate given to the grantee is intended to be beneficial, or merely in trust. The use of the words "trust" and "confidence" are not necessarily incompatible with the supposition of a residuary interest in the person of the grantee, and cases may arise in which the meaning of those words would be satisfied according to the apparent intention, by holding them to apply to the directions as to the payment of debts and legacies.(a)

Distinction between partial and total trust.

1562. Words of exheredation will not have the effect of excluding the heir in heritage from a resulting interest, and that for two reasons; first, because the heir is a favoured person in the eye of the law; and secondly, because, failing the heir, there is no other

Heir-at-law cannot be excluded by dis-inheriting words.

(x) *Finnie v. Commrs. of Treasury*, 30 Nov. 1836, 15 Sh. 165.

(y) *Miller v. Black's Trs.*, 14 July 1837, 2 S. & M'L. 888, *per* Lord Brougham.

(a) *Hamilton v. Gordon*, 1724, M. 6588. In England it has also been held that the natural construction of the words "trust" and "trustee" may be negatived by the context or the scope of the instrument; Lewin on Trusts, 5th ed., p. 119. Thus, where a father settled his estates upon his

son upon the trusts thereafter mentioned, whereby certain interests were given to his wife, a daughter, and a niece, but no trust was declared of the surplus, it was held that the surplus did not result, but belonged to the son; *Cook v. Hutchinson*, 1 Keen, 42; and a similar decision was pronounced in a case where two estates were given to a nephew, and a trust only declared as to one of them; *Hughes v. Evans*, 13 Sim. 496.

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person to whom the lapsed interest can devolve. A truster, who wishes in any event to exclude his legal representatives from the succession, can only accomplish this object by declaring a testamentary intention in favour of some other beneficiary; he cannot disinherit by a mere negation. (b) Accordingly, where a truster, after expressly excluding his heir-at-law from the succession to his unentailed estates, conveyed his whole estate, heritable and moveable, to trustees, upon trust for payment of certain provisions to his younger children, under reservation of a power, which was never exercised, to dispose of the residue,—the heir-at-law was found to be entitled to the estate, subject to the burden of the provisions. (c) And where an estate was destined to the issue of the heir-at-law, failing certain other parties instituted in the first order, who all predeceased the settlor without issue, the Court were clearly of opinion that the heir was entitled to the succession, disregarding a clause of express exclusion. He was accordingly allowed to enter into possession of the rents, upon caution to repeat in the event of issue being born. (d)

How an intention may be inferred to give the trustee a beneficial interest.

1563. The question, what words are sufficient to give the grantee a beneficial interest, is discussed with much anxiety by English jurists; such questions being more frequently presented for decision in the Court of Chancery than with us, in consequence apparently of a greater laxity in the styles of disposition in English testamentary instruments. As the principles of construction deducible from the Chancery decisions are tolerably free from the disturbing influence of technical rules, they will probably be found to be not inapplicable to similar cases occurring in Scotland, as they are obviously calculated to aid the discovery of the testator's intention. On this ground, we have introduced into the text a condensed statement of their import.

Intention to benefit inferred from expressions of affection.

1564. (1) Expressions of affection or regard are evidence of an intention to benefit; and the weight to be attached to such expressions is for the consideration of the Court. The relationship of the parties is also an element of evidence. For example, where a testator, having given £5 to his brother (who was his heir-at-law), made and constituted his "dearly beloved wife" sole executrix and heiress of all his lands and real and personal estate, to sell and dispose thereof at pleasure, the conveyance was held to be absolute. Lord

(b) *Blackwood v. Dykes*, 26 Feb. 1833, 11 Sh. 448; *Stoddart v. Thomson*, 1734, Elch. "Succession," No. 1.

(c) *Sinclair v. Traill*, 27 Feb. 1840, 2 D. 694.

(d) *Blackwood v. Blackwood's Trs.*, 11

June 1883, 11 Sh. 699; *ibid.* p. 443. As to whether a clause of exclusion is effectual to prevent the heir succeeding in his order on the failure of heirs first named in the settlement, see *Ayton v. Alison's Crs.*, 1742, M. 14,985.

Chancellor King observed, that in using the language of tenderness, the testator must have intended something beneficial, and not what would be a trouble only; and the argument was stronger when the heir had a legacy.(e) But neither of these circumstances alone is sufficient to impart a beneficial character to the devise.(f)

1565. (2) The mere description of the devisee in the character of a relation, as "My cousin," "My brother," is insufficient to exclude the heir's resulting interest.(g) But where a testator, after paying pecuniary legacies to three of his nine children, and stating why he did not provide for three others, appointed his three remaining children to be executors, and certain strangers to be trustees, and the will contained no gift of residue, it was held that these executors took beneficially.(h) And where estate was conveyed to a devisee in trust for purposes which did not exhaust the residue, an express disinherison of the heir, taken in connection with the testator's description of the devisee as his "most dutiful and respectful nephew," was held equivalent to a residuary destination in favour of the latter.(i)

1566. (3) A devise of property "subject to" or "chargeable with" debts and legacies, is a beneficial conveyance of the residue, as was found by the concurrent decisions of the Courts of Chancery and King's Bench in *King v. Denison*.(k) And where a testator gave all his real and personal estate to his wife, "upon trust" that she, *at the time of her decease*, should cause to be paid to certain persons, should they survive her, certain specified legacies, Vice-Chancellor Stuart decided that the undisposed-of interest belonged to the wife, as the will, he thought, made her "a trustee of that portion of the property only which is given to the legatees other than herself." (l)

(4) In the case of a disposition of an estate subject to a charge, if the *charge* eventually fails from any cause, there is no lapse, but the devisee takes the entire estate.(m)

1567. Reverting to native sources of authority,—if the terms of a conveyance are such as to give by implication a reversionary in-

Where the trust is merely a burden on a larger estate, the residue belongs to the disponent.

Disposition of heritage under burden of legacies leaves the beneficial interest in the disponent.

(e) *Rogers v. Rogers*, 8 P. W. 193.

(f) *Wych v. Packington*, decided by the House of Lords, 8 Br. Par. Ca. (Toml. ed.) 44, where the expression was, "My dear wife;" *Randall v. Bookey*, 2 Vern. 425, and *Hughes v. Evans*, 18 Sim. 504, where a legacy to the heir was held insufficient to rebut the presumption for a resulting trust.

(g) 1 Jarman on Wills, 3d ed. 534; *King v. Denison*, 1 V. & B. 276, per Lord Eldon.

(h) *Harrison v. Harrison*, 33 L. J. Ch.

647. A gift "to the persons hereinafter appointed my executors," in equal shares, was held beneficial in *Hoare v. Osborne*, 33 L. J. Ch. 586.

(i) *Hughes v. Evans*, 18 Sim. 496.

(k) 1 V. & B. 261.

(l) *Williams v. Roberts*, 27 L. J. Ch. Ca. 177; *Wood v. Cox*, 6 L. J. Ch. 366.

(m) *Cooke v. The Stationers' Co.*, 3 M. & K. 264, where the distinction between the failure of a *charge upon* and an *exception from* a devise is stated by Sir J. Leach.

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terest in the heritable estate to a disponee, it seems that he will also, as a favoured beneficiary, be entitled to the benefit of any lapsed legacy charged upon it.⁽ⁿ⁾ In the cases that have occurred relative to the vesting of legacies charged on heritage, the competition has generally been betwixt the *disponer* and some party claiming the legacy as conditional institute,^(o) which is sufficient to show that the next of kin have never been supposed to have any claim; and though the disponee in some of the cases referred to might have claimed the lapsed legacies in the character of heir-at-law, it does not appear that in any of them a claim was actually made upon this footing. On principle, it is clear that the disponee, and not the heir, ought to have the benefit of the lapse. A legacy charged on a special subject, is either a trust or a burden. In the former view, the conveyance to the disponee personally is equivalent to a destination in his favour of the residuary interest; in the latter, which is probably the more correct view, then on the occurrence of a lapse, the burden (being in its nature personal to the legatee) is extinguished by his predecease, and, never having been made real by infeftment,^(p) it cannot affect the estate so as to give rise to a resulting interest.

Office of executor is in its own nature a beneficial title.

1568. By the ancient law of Scotland there could be no partial intestacy in moveable succession, since the appointment of an executor was regarded as a bequest of the free succession, after deducting debts and legacies. But by the Statute 1617, cap. 14, executors were obliged "to make count, reckoning, and payment of the whole goods and gear appertaining to the defunct, and intromitted with by them, to the wife, children, and nearest of kin, according to the division observed by the laws of this realm." The Statute, however, allowed executors-nominate to retain to their own use a third of the "defunct's part," debts being deducted, and legacies to the executor being taken *in computo* of his share. This statutory interest of executors in the dead's part, which in its inception was an evident compromise between the theoretical idea of the executor's office as a trust for the next of kin and the practice of the time, long maintained an anomalous position in the Statute-book,^(q) until at length

(n) *Breadalbane Trs. v. Lady E. Pringle*, 15 June 1841, 3 D. 357.

(o) *Cairns v. Cairns*, 11 March 1829, 7 Sh. 571; *Dunlop v. Crawford*, 2 June 1812, F.C.; *Aitchison v. Allan*, 16 Feb. 1831, 9 Sh. 454; *Wilkie v. Jackson*, 9 July 1836, 14 Sh. 1121; *Greig v. Moodie*, 30 Nov. 1839, 2 D. 169.

(p) See *Martin v. Paterson*, 22 June

1808; M. "Personal and Real," App. No. 5; *Macdonald v. Place*, 24 Feb. 1821, Hume, 544; *Wyllie v. Allan*, 19 Jan. 1830, 8 Sh. 337.

(q) The law was never in desuetude. See *Nasmyth v. Hare*, 17 Feb. 1819, F.C.; *Finnie v. Coms. of Treasury*, 30 Nov. 1836, 15 Sh. 165; *Grant v. Murray*, 28 June 1852, 1 Macq. 178, affirming 12 D. 201.

it was abrogated by the Moveable Succession Act, (r) which enacts, that "So much of an Act of the Parliament of Scotland, passed in the year One thousand six hundred and seventeen, and entitled *Anent Executors*, as allows executors-nominate to retain to their own use a third of the dead's part in accounting for the moveable estate of the deceased, is hereby repealed, and executors-nominate shall, as such, have no right to any part of the said estate." An executor appointed by simple nomination is therefore now, in the fullest sense—as he was said to be by the institutional writers—a trustee for the next of kin, children, and widow, according to their respective interests. (s)

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Executry made a trust by Statute.

1569. An important, and still unsettled question, is whether executors-nominate are entitled to retain the whole succession as against the Crown. The Act 1617, cap. 14, did not alter the nature of the executor's estate and office, but merely superimposed upon it the burden of accounting *to the wife, children, and nearest of kin*, under reservation of a third. The Crown certainly cannot take in the character of next of kin; and the Act, while expressly recognising the beneficial title of executors at common law, does not impose upon them the burden of accounting for the succession to the Crown. The Moveable Succession Act, § 8, is merely a *repealing*, not a declaratory enactment, and does not seem to touch the question. In *Finnie v. The Comrs. of the Treasury*, where the question was raised, the Court found the executors liable to account, because they were also disponees in trust; but Lord Corehouse reserved the general question as to the accountability of executors. (t) We may add, that the construction put upon the English Statute, declaring that executors shall be deemed "trustees for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions," is adverse to the claim of the Crown. (u)

Whether executor-nominate takes a beneficial interest in a question with the Crown.

1570. Where an executor is appointed universal legatee, or legatory, he of course holds the estate for his individual benefit, subject to such special trusts for payment of legacies, etc., as may be contained in the testament. (x) It does not appear that the words

Title of "universal legatee," a beneficial title: *quære*, as to "universal intromitter."

(r) 18 & 19 Vict., cap. 23, § 8.

(s) Stair, 3, 4, 24; Ersk. 3, 9, 26; Bell's Pr. § 1899.

(t) See *Finnie's case*, *supra*.

(u) By the law which was in force in England prior to 11 Geo. IV. & 1 Will. IV. cap. 40, the nomination of an executor gave a title to the beneficial enjoyment of the surplus, unless the will, expressly or impliedly, invested the executor with the character of a trustee, as by giving him a

legacy for his trouble; Lewin on Trusts, 5th ed. p. 49. By the Act referred to he is now *prima facie* a trustee for the *next of kin*. But if there be no next of kin, the executor may still retain as against the Crown, unless he is expressly declared a trustee; *Read v. Steadman*, 26 Beav. 495; see Lord Truro's opinion in *Murray v. Grant*, 1 Macq. 188.

(x) See *Oliphant v. Oliphant*, 1626, M. 3923.

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“universal intromitter” have ever been supposed to give a beneficial interest.(y) However, it might be plausibly maintained, that as the Act 1617, cap. 14, only imposes the obligation of accounting upon *executors*, and does not expressly make mention of *universal intromitters*, the common law right of persons nominated in the latter capacity is not taken away. The answer would seem to depend on the meaning of the word “intromitter,” i.e., which is probably synonymous with executor. But since, *ex concessis*, “universal intromitter,” prior to the Statute, was also synonymous with “universal legatory,” or of equivalent meaning, the point cannot, in the absence of express decision, be considered free from doubt.

Effect of an express exclusion of next of kin.

1571. A beneficial interest has been held to be given to the executors of a testament—not of a trust-disposition—by a clause excluding the right of the testator’s next of kin.(z) The reason of the distinction is, that the title of an executor is in its own nature an unqualified title, and the exclusion of the next of kin may be held equivalent to a declaration that the provisions of the Statute 1617, cap. 14 (*sed quære* as to 18 Vict., cap. 23), shall not apply. But a clause of exclusion of the next of kin has not the effect of vesting the residuary or resulting interest in such executors as are also *disponees in trust*, on account of the limited nature of the title of trust-disponees; and accordingly, on the failure of next of kin, the estate, as we have seen, falls to the Crown.(a) It is doubtful whether an exclusion of next of kin would now be held to operate in favour of executors-nominate. More probably, it would be held to be altogether inoperative, upon the authority of the cases in relation to heritable estate.(b) It deserves to be considered whether the exclusion of some only of the legal representatives should not be effectual as a gift to the others.

Heritable interests go to the heir; moveable to the next of kin.

1572. III. WHO ARE ENTITLED TO THE RESULTING-INTEREST.—The general rule is, that heritable interests go to the heir,(c) and moveable to the next of kin.(d) In the application of this rule, two

(y) The point did not arise in *Murray v. Grant*, 1 Macq. 178, as these words were not used. See the deeds narrated in 11 D. 860; in *Beizly v. Napier*, *infra*, the executor had power (“which,” adds Kilkeran, “the office implies”) to intromit with the whole money and effects of the defunct. See the meaning of these terms explained in the opinions of the judges in *White v. Finlay*, 15 Nov. 1861, 24 D. 88; where the difference in point of extent between the executor’s and the universal legatee’s estate is brought out; the former comprehending the entire succession, the latter consisting only of the dead’s part.

(z) *Beizly v. Napier*, 1789, M. 6591.

(a) *Finnie v. Coms. of Treasury*, *supra*, p. 182.

(b) See opinion in the second case of *Lord v. Colvin*, *per* Lord Curriehill, 3 Macph. 1088.

(c) *Turnbull v. Cowan*, 17 March 1848, 6 Bell, 222; *Sinclair v. Traill*, 27 Feb. 1840, 2 D. 695; *Finnie v. Lords of Treasury*, 30 Nov. 1836, 15 Sh. 165.

(d) *Torrie v. Munsie*, 31 May 1832, 10 Sh. 597; *Lord v. Colvin*, 7 Dec. 1860, 23 D. 111; 15 July 1865, 3 Macph. 1083.

questions of general importance have been raised: First, In the case of a lapse occurring at a period subsequent to the testator's death, which may happen in any case of suspended vesting, does the resulting interest accrue to the heir-at-law of the defunct, or does it accrue to the person who would be his heir, supposing the succession to open at the time at which the resulting interest emerges? Secondly, Is the quality of a resulting interest, as heritable or moveable, affected by a direction to convert?

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1573. Several cases on the first question have arisen on the construction of the Thellusson Act,(e) which enacts, with reference to the appropriation of the prohibited accumulations, that they shall "go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed." It was laid down by Lord Langdale, that accumulations falling under this prohibition were to be dealt with as *intestate succession*; and further, that where the fund was the produce of heritable estate, it belonged, notwithstanding a direction to convert into money, to the heir-at-law, not to the executor.(f) The question was further considered in the case of *Macpherson v. Stewart*,(g) where the residue of the testator's property was directed to be accumulated for three lives, for the benefit of his heirs; and Vice-Ch. Kindersley decided, that as those who were next of kin of the testator at the time of his death would have taken the accumulations had they survived the statutory period of accumulation, the representatives of such as had died within that period were entitled to a share in the distribution.

Lapsed interests result to the persons having the character of heir at the opening of the succession

1574. As to the effect of a direction to convert, it is matter of settled law in England, that lapsed interests are not affected by such directions, but pass as simple intestacy to the heirs entitled to succeed to the estate as it stood in the person of the truster. And therefore, if an estate is devised upon trust to sell for a specified purpose, and that purpose fail, wholly or partially, the interest remaining undisposed of, whether the estate has been actually sold or not, results to the heir-at-law, and not to the executor.(h) There is here, accordingly, an exception to the rule, that property given to trustees to be converted into money becomes personal estate of the beneficiary. Conversely, it is held in England, that where money is directed to be laid out in the purchase of lands

Succession to lapsed interests not affected by conversion of the estate. Doctrine of the law of England.

(e) 39 & 40 Geo. III. cap. 98.

(f) *Eyre v. Marsden*, 2 Keen, 564, 7 L. J. 220; and see *M'Donald v. Bryce*, 2 Keen, 276, 7 L. J. Ch. 173; *Tench v. Cheese*, 6 De Gex, M'N. & G. 453.

(g) *Macpherson v. Stewart*, 28 L. J. Ch. 177.

(h) *Ackroyd v. Smithson*, 1 B. C. C. 508; *Amphlett v. Parke*, 2 L. & M. 226; *Taylor v. Taylor*, 8 De Gex, M'N. & G. 190, 22 L. J. Ch. 742, the leading case; and see Lewin on Trusts, 5th ed. p. 121, and cases there cited.

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upon trusts which fail or which do not exhaust the estate, the surplus proceeds result to the next of kin (although, if the right had vested in the heirs named in the settlement, it would have passed as realty). It was observed by Lord Eldon, that "where the purpose fails, the intention fails; and the Court regards the settlor as not having directed the conversion."⁽ⁱ⁾

Dick v. Gillies.

1575. Both questions were the subject of consideration in the case of *Dick v. Gillies*, in the Court of Session.^(k) On the point as to the ascertainment of the heirs entitled to succeed to the resulting interest, this case is overruled by *Lord v. Colvin*, the First Division of the Court of Session having declared, in answer to a remit from the Court of Chancery, that the persons entitled to the lapsed interest in accumulations are the legal personal representatives,^(l) and not those who would be next of kin to the testator at the time of the lapse, which was the view adopted by the judges who decided *Dick v. Gillies*. On the point as to conversion, it is necessary to explain that the testator, Mr Dick, had directed his trustees to sell his heritable property and to lay out so much upon heritable security to provide a fund for payment of certain annuities. The residue, having been made divisible amongst charitable institutions, which were not named, became a lapsed interest. The Court decided that the price of the estate directed to be sold was to be held as moveable, and that the money directed to be laid out upon heritable security was to be considered heritable.

Whether lapsed interests in Scotland are affected by the rules of conversion.

Question considered as one of principle.

1576. In *Finnie v. Comrs. of the Treasury*,^(m) Lord Corehouse, who had not taken part in the decision of *Dick v. Gillies*, expressed a strong opinion that a power of sale, even when accompanied by words of direction, did not convert a lapsed succession from heritable to moveable; though, as the Crown was entitled to the resulting interest *utrâque viâ data*, it was not necessary to decide the point. The import of the decisions in cases of simple intestacy, which present many analogies to lapsed interests, is, that the nature of the subject, as it actually stood at the death of the testator, must determine the character of the succession,⁽ⁿ⁾ unless the property has been converted without the knowledge of the proprietor; as, for example, during his absence in a foreign country.^(o) It is

⁽ⁱ⁾ *Ripley v. Waterworth*, 7 Ves. 485; *Logan v. Stevens*, 5 L. J. Ch. 17. This subject is discussed in chap. 11, sect. 1.

^(k) *Dick v. Gillies*, 4 July 1828, 6 Sh. 1065.

^(l) *Lord v. Colvin*, 7 Dec. 1860, 28 D. 111; second case, 15 July 1865, 8 Macph. 1088.

^(m) *Finnie v. Comrs. of Treasury*, 30 Nov. 1836, 15 Sh. 165.

⁽ⁿ⁾ *Williamson v. Williamson's Trs.*, 15 Dec. 1849, 12 D. 872; *Adv.-Gen. v. Anstruther*, 2 July 1842, 13 D. 450; Ex. Rep. No. 8; *Ramsay v. Cowan*, 11 July 1838, 11 Sh. 967; *Davidson v. Kyde*, 1797, M. 5597.

^(o) *Garland v. Stewart*, 12 Nov. 1841, 4 D. 1.

to be observed, that although the principle of constructive conversion has been recognised in cases where the settlor's own next of kin have claimed a succession in virtue of a destination to them in their character as his heirs, (p) yet such cases are of little moment in the consideration of the present question. The intention to convert from heritable to moveable, or the contrary, may be good to regulate the succession of the parties for whose benefit the trust was created; but it does not follow that such intention can affect a lapsed interest, which goes to the settlor's heirs, not as heirs of the destination, but as heirs *ab intestato*.

1577. The view here taken is supported by the opinion of Lord Colonsay, if not by the judgment itself, in the case of *Neilson v. Stewart*. (q) The testator, by the fifth purpose of his trust-settlement, directed his trustees to convert his whole means and estate into cash, and to pay over the free proceeds thereof to the children of D. S. By a codicil, executed on deathbed, he revoked the fifth purpose *in so far as it provided for the disposal or division of the proceeds of the residue of his said means and estate*, and gave other directions as to its disposal, but left the direction to sell intact. The question was, whether the heir-at-law had a title to reduce the codicil *ex capite lecti*? If the effect of rescinding the codicil would have been to let in the personal representatives as heirs of the heritable estate directed to be sold, the heir must have been barred by want of interest from insisting in the action of reduction. The judges were unanimous in sustaining the heir's title, being of opinion that the codicil was effectual as a revocation of the residuary destination under the settlement, and that the lapsed interest in the heritable subjects directed to be sold resulted to the heir-at-law.

Dictum of Lord President M'Neill in Neilson v. Stewart.

1578. Any interest that would otherwise become lapsed, may of course be saved by a destination over, clause of survivorship, or general residuary destination. On the effect of these clauses reference is made to the chapters appropriated to their discussion. The heir's resulting interest in relation to lapsed shares of succession, may also be excluded by the operation of a previously executed settlement disposing of the estate in a different manner; for the implied revocation effected by a subsequent will has relation only to such dispositions of the estate as are irreconcilable with the prior dispositions; and where the destination in the subsequent will fails,

Lapse avoided by residuary destination, etc.

Or by a previous unrevoked settlement.

(p) *Angus v. Angus*, 6 Dec. 1825, 4 Sh. 279; *Lawson v. Stewart*, 24 Jan. 1826, 4 Sh. 384, N. E. 386; *Patrick v. Nichol*, 7 Dec. 1838, 1 F. 207.

(q) *Neilson v. Stewart*, 3 Feb. 1860, 22 D. 646.

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there is no repugnancy, but a mere failure to alter the subsisting destination.^(r) And where the later will contains a clause of express revocation of prior wills in so far as inconsistent therewith, yet if it omits to dispose of any particular subject, the disposition of the first settlement as to that subject will remain in force.^(s)

SECTION II.

RESULTING INTERESTS UNDER CHARITABLE TRUSTS.

To what persons a beneficial interest may result.

1579. There are three classes of persons by whom surplus funds accruing under a charitable bequest may be claimed—the beneficiaries properly so called, the trustees, and the heirs of the trustor. The beneficiary, that is, the person or object for whose benefit the estate was bequeathed, has the primary claim; and the mere circumstance of the revenue of the estate having largely increased since the testator's death, is not a reason for diverting the increment of the fund, unless the revenue is more than is sufficient for the liberal endowment of the object of the bequest.^(t)

Whether a beneficial interest can in any case result to the trustees.

1580. In regard to the trustees, the general rule is, that where a bequest is made to them and to their successors in office, such bequest is held to be in trust, and not beneficial to themselves, unless express words or plain implication show an opposite intention.^(u) An illustration of the circumstances in which an interest, accordingly, does result in favour of the trustees personally, is furnished by the case of *Burnett v. King's College of Aberdeen*.^(x) Sir Thomas Burnett, the founder, mortified certain lands in favour of the College, and “provydit thrie burseris of philosophie to be educat, brocht up, and maintenit, every ane of thame for the space of four zeiris, at the said Kingis Colledge of Auld Aberdeen, according to the maner, measour, and qualitie, and as the rest of the burseris of philosophie presentlie in the said Colledge alreddie foundit are educat and enteritenit.” Sir Thomas reserved the patronage of the bursaries to himself and his successors, and declared that if the College should at any time refuse to receive his presentees, the mortified lands should return to him. At the date of the deed, 1648, the rents of the lands were not sufficient for the support and education of the three bursars, but the College supplied the defi-

^(r) *Alves v. Alves*, 8 March 1861, 23 D. 712.

^(s) *Allan v. Glasgow's Trs.*, 28 Jan. 1842, 4 D. 494.

^(t) *Rennie v. Tod*, 21 July 1806, 5 Pat. 144.

^(u) *Black's Trustees v. Miller*, 28 Feb. 1836, 14 Sh. 555, and 2 S. & M.L. 866.

^(x) *Burnett v. King's College of Aberdeen*, 28 Feb. 1844, 6 D. 781; reversed 28 Aug. 1846, 5 Bell, 409.

ciency out of their own funds. In course of time, however, the rents increased so as to leave a large surplus; and the question came to be, whether the College was entitled to retain this surplus for its own purposes, or was obliged to expend the whole upon the bursars. The Court of Session decided against the College. Lords Fullerton and Jeffrey, who concurred in the judgment, both said, (y) that a conveyance was not to be presumed to be a beneficial one in favour of the trustees themselves, unless there was a balance left undisposed of by the trust-deed; but that, if there were such balance, then any subsequent balance would go to the trustees themselves. They were of opinion, however, that the principle did not apply in the present case, seeing that in 1648 the rents were insufficient to maintain the three bursars. The House of Lords reversed this judgment, and held that, after maintaining the bursars according to the manner, measure, and quality of the other bursars within it, the College was entitled to retain the surplus.

1581. Lord Cottenham said, (z) the donee under a trust will get the benefit of any increase of the fund, "1st, if the gift be to the donee, subject to certain payments to others; (a) 2d, if the gift be upon condition of making certain payments, subject to forfeiture upon non-performance of the condition; (b) or 3d, if the donee might be a loser by the insufficiency of the fund, which, indeed, is consequential upon the last." (c) His Lordship held that all these elements combined in the present case to give the increase in the fund to the trust donee, to wit, the College. In delivering judgment, Lord Cottenham was at great pains to show that there was

Conditions under which the trustee may take a resulting interest defined by Lord Cottenham.

(y) 6 D. 750 and 752.

(z) 5 Bell, 431.

(a) *Attorney-General v. Fishmongers' Co.*, 5 My. & Cr. 11, 16; *Attorney-General v. Smythies*, 2 Russ. & My. 717, 2 L. J. Ch. 58. The corporation consisted of one warden and five poor brothers; and it was directed that, out of the rents, £2, 12s. should be paid to each poor brother, and that the remainder should be applied to support the warden and poor of the hospital, and for repairs. The value of the property had greatly increased when the information was filed. However, Lord Brougham, Ch., reversing the decision of Sir John Leach, held that no more could be given to the charity than five sums of 52s., and that the warden was entitled to the surplus. "If," said his Lordship, "I give a fund entirely to one body, subject to certain payments to other parties, these can only take what is given as a charge, and the

surplus must go to the donee of the fund, unless there be circumstances clearly indicating a contrary intention; 2 L. J. Ch. 64.

(b) *Attorney-General v. Cordwainers' Co.*, 8 My. & K. 534, decided by Sir John Leach, where property was devised to a corporation to pay certain charitable bequests out of the rents, with a destination over to testator's brother in case the corporation should neglect to perform his will. His Honour observed, "This is a gift upon condition, and not merely a trust; the condition of forfeiture proves the intention to give a benefit; the imposition of a penalty for non-performance of a condition implies a benefit if the condition be performed."

(c) *Attorney-General v. Corporation of Bristol*, 2 Jac. & W. 820; *Thetford School case*, 8 Co. Rep. 130 (vol. iv. p. 401).

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Distinction between a trust of the entire subject and a burden.

In what cases an interest in estate destined to charitable uses may result to the heir.

Where the trust is made conditional on the trustee's acceptance.

no adverse precedent in Scotland; though, from the tone of his remarks, it is very doubtful whether, had he found one, he would have allowed it to stand in the way of his design of reconciling the principles and practice "in the two jurisdictions." In particular, he dealt with the case of the *Perth Hospital*,^(d) and pointed out that that authority was not against his view, because there truly there was no "limit of the expenditure to be bestowed upon the first object of the gift." So far as the judgment itself went, his Lordship was quite correct; but he does not appear to have remarked that, in the *obiter dicta* of the judges who took part in it, this view very clearly appears, that had there been any reversion, in their opinion it would not have gone to the trust-donee of the hospital, but to the heir of the donor or patron. This oversight on the part of Lord Cottenham must deprive his judgment of the full value which otherwise it would have had.^(e)

1582. There is a very old case,^(f) in which a testator left 4000 merks to build a bridge over the Blackadder. The executor built one for 1000 merks; but the Court held that he ought to have "waired" the whole sum on the bridge, and, therefore, on a sort of *cy-près* principle, ordained him to expend the balance on another bridge. Here, accordingly, though there was actually an undisposed of balance, no interest was held to result in favour of the executor; the true *ratio decidendi*, however, doubtless being that the executor's conduct was a fraud on the trust.

1583. The resulting right of the heir may either be to the whole estate, or to a surplus. In *Black's Trs. v. Miller*, Lord Brougham observed,^(g) "If a trustee dies or refuses the trust, where it is quite clear that the intention of the testator was that, in that event, the heir shall take the estate *discharged of any trust*, the Court would not be fulfilling the intention of the maker of the deed, but acting

^(d) *Managers of Perth Hospital v. The Patrons*, 1795, Bell's Fol. Ca. 173.

^(e) We may add, that we entertain a strong opinion that the doctrine of a resulting beneficial interest in the trust-dispensee is only maintainable in the following cases:—namely, (1) where the disponees are the representatives of a public institution, such as a college or a municipal corporation, and the surplus is sought to be applied not to their individual benefit, but to the general purposes of the institution, as distinguished from the special object of the bequest; and (2) where the disponees are either relatives of the settlor or *personæ predilectæ*, and the disposition is not ex-

pressly qualified by words of trust, but may fairly be construed (on the principles explained by Lord Cottenham) as an absolute and beneficial disposition, subject to the *burden* of the charitable bequest; and (3) where from the antiquity of the endowment it is impossible to ascertain the parties who, as heirs of the settlor, would be entitled to the resulting interest in preference to the trustees.

^(f) *Commissioners of Berwickshire v. Craw*, 1678, M. 1851.

^(g) *Black's Trs. v. Miller*, 2 S. & M.L. 890. See *Managers of Perth Hospital v. The Patrons*, *supra*.

contrary to his intention, if it supplied a trustee in that case ; that is the very event provided for in which it was to go over, and the trust to cease." Again, in *M'Leish's Trs. v. Gibson & Ors.*,^(h) a testator conveyed his whole property in favour of trustees, the free annual proceeds thereof to be employed "solely for the use of the poor of the Episcopal communion of Scotland." The annual appropriation contemplated by the trust-deed amounted to £350, which was to be divided according to certain rates, specified with great particularity, among 140 poor persons. The Court, while holding that the trust-deed excluded the heir-at-law and next of kin for the time, reserved to them any eventual interest which might arise, in case the purposes of the trust should at any time become wholly or partially impracticable.

1584. The Judges were also of opinion that the truster's directions as to the appropriation of the annual proceeds to a certain number of persons, and at certain rates, were to be taken as demonstrative only, and not as taxative; and therefore, that any surplus revenue might be employed in adding to the number of persons, or increasing to a reasonable extent the sums to be paid, or even in forming a reserve fund for supplying deficiencies in future years, or defraying the expenses of necessary repairs; but "without prejudice, nevertheless, to any question which might arise by the possible emergence of any great excess of the funds, beyond what can fairly be required under the most liberal construction, for fully satisfying all the declared objects of the trust." In giving his opinion, Lord Moncreiff said: (i)—"Within moderate bounds, there may be a discretion to increase the sums, or to reserve the surplus for repairs and future deficiencies; but if it came to an excess, as, if there were no claims, or so few as to make the shares far beyond the fair object, or the reserved funds were to be beyond any fair necessity, I should have great doubt whether the heirs-at-law would not have an interest."

Where the purposes do not exhaust the estate.

1585. In the *Morgan* case, where the subject of the bequest was a moveable fund, a clear opinion was intimated by the law lords, to the effect that the surplus estate, after a fair and liberal provision had been made for the objects of the charity, belonged to the truster's next of kin.^(k) In accordance with these opinions, and no opposition having been offered, the Court of Session, after

Where the amount of the bequest is not specified, and there is a surplus after providing for the charity.

(h) *M'Leish's Trs. v. Gibson & Ors.*, 25 May 1841, 3 D. 914.

(i) 3 D. 926.

(k) *Mags. of Dundee v. Morris*. See Lord Wensleydale's opinion, 8 Macq. 175, and the judgment of the House, which declared

that the will was a bequest of *so much* of the personal estate as was necessary to provide an hospital for 100 boys. In this case, as there was no testamentary appointment of trustees, no doubt could arise as to *who* was entitled to the surplus.

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Where the bequest fails.

Import of the authorities.

Summary of the results of the English authorities.

providing for the building and endowment of an hospital at a cost of £73,500,^(l) preferred the next of kin to the balance of the fund *in medio*. There can be no doubt, of course, that if the settlement fails altogether, either in consequence of vagueness, or because the object is unattainable, the estate will result to the heir-at-law as intestacy.^(m)

1586. The fair import of the decisions would therefore seem to be:—(1) Where there is a conveyance to trustees on the condition of their making certain payments to the beneficiaries, and the proceeds of the trust-estate increase beyond the amount of these payments, the surplus will go to the trustees themselves.⁽ⁿ⁾ Wherever, in fact, there is a bargain or agreement—for so Lord Cottenham put it in the case of the Burnett bursaries^(o)—between the truster and the trustees, by which, in one event, the trustees may suffer loss,—if the value of the trust-estate increases, they, on the other hand, receive the benefit of the increase. (2) Where the truster appoints trustees, and, without entering into any agreement with them, simply directs certain payments to be made by them, if there comes to be a considerable surplus, it will go to the heirs-at-law of the truster. (3) If the trust purposes become impracticable, wholly or partially, a trust will result in favour of the truster's heirs-at-law.

1587. In England, the leading case on this subject is Lord Eldon's celebrated judgment in *The Attorney-General v. The Mayor of Bristol*.^(p) Mr Lewin summarises the results of that decision, as well as those preceding and following it, with admirable clearness, thus:^(q)—"It may be noticed that settlements to charitable purposes are an exception from the law of resulting trusts; for upon the construction of instruments of this kind the Court has adopted the following rules:—1. Where a person makes a valid gift, whether by deed or will, and expresses a general intention of

(l) 8 Feb. 1861, 23 D. 498.

(m) *Mason v. Skinner*, 6 March 1844, 16 Jur. 422. To this principle we may refer Lord Jerviswoode's decision in the case of *Duff's Trs. v. Societies of Scripture Readers*. The legacy was in the following terms:—"I bequeath to the Societies of Scripture Readers in the following towns (nine towns named) the interest of my Peninsular East India Railway funds, to be equally annually divided amongst them." Claims having been lodged for four societies, the Lord Ordinary found each of

them entitled only to a one-ninth share of the specific legacy, and preferred the residuary legatee for the balance; 18 March 1862, 24 D. 557.

(n) But see note, § 1581, *supra*, note (e).

(o) 5 Bell, 481. *University of Aberdeen v. Irvine*, 8 Feb. 1866, 4 Macph. 392. If the decision is maintainable, it must be on the ground stated in the text. [Reversed, 26 March 1868.]

(p) *Attorney-General v. Mayor of Bristol*, 2 Jacob & Walker, 294.

(q) Lewin on Trusts, 5th ed. p. 130.

charity, but either particularises no objects,(r) or such as do not exhaust the proceeds,(s) the Court will not suffer the property, in the first case, or the surplus in the second, to result to the settlor or his representatives, but will take upon itself to execute the general intention, by declaring the particular purposes to which the fund shall be applied. 2. Where a person settles lands, or the rents and profits of lands, to purposes which at the time exhaust the whole proceeds, but, in consequence of an increase in the value of the estate, an excess of income subsequently arises, the Court will order the surplus, instead of resulting, to be applied in the same or a similar manner with the original amount.(t) 3. But even in the case of charity, if the settlor do not give the land, or the whole rents of the land, but, noticing the property to be of a certain value, appropriate part only to the charity, the residue will then, according to the circumstances of the case, either result to the heir-at-law,(u) or belong to the donee of the property subject to the charge, if the latter be (as in the case of a charitable corporation) itself an object of charity.”(x) Mr Lewin then goes on to observe that the law was settled at a time when the doctrine of resulting trusts was imperfectly understood, and that there is little doubt, were the subject still open, the Court would in the general case hold a trust to result.(y)

(r) *Attorney-General v. Herrick*, Amb. 712.

(s) *Attorney-General v. Haberdashers' Company*, 4 B. C. C. 102, and 2 Ves. jun. 1; *Attorney-General v. Minahull*, 4 Vea. 11; *Attorney-General v. Arnold*, Shower's P. C. 22; and see *Attorney-General v. Sparks*, Amb. 201; and Lord Eldon's observations in *Attorney-General v. Mayor of Bristol*, 2 Jac. & W. 319.

(t) *Inhabitants of Eltham v. Warreyn*, Duke, 67; *Sutton Colefield* case, second resolution, *id.* 68; *Hynshaw v. Morpeth Corporation*, *id.* 69; *Thetford School* case, 8 Coke, 130 b. (vol. iv. 401); *Attorney-General v. Johnson*, Amb. 190; *Kensington Hasting's* case, Duke, 71; *Attorney-General v. Mayor of Coventry*, 2 Vern. 397, reversed in H. of L., 7 B. P. C. 236 (see the foregoing cases commented upon by Lord Eldon in *Attorney-General v. Mayor of Bristol*, 2 J. & W. 316); *Attorney-General v. Coopers' Company*, 19 Ves. 189, per Lord Eldon; *Attorney-General v. Wilson*, 3 M. & K. 362; *Lord v. London City*, Mos. 99; *Attorney-General v. Master of Catherine*

Hall, Cambridge, Jac. 881; *Attorney-General v. Beverley*, 6 H. L. Cases, 310; *Attorney-General v. Drapers' Co.*, 2 Beav. 508, 4 Beav. 67; *Attorney-General v. Christ's Hospital*, *id.* 73; *Attorney-General v. Merchants Venturers' Society*, 5 Beav. 338; *Attorney-General v. Corporation of South Molton*, 14 Beav. 357; *Attorney-General v. Caius College*, 2 Keen, 150; and see *Attorney-General v. Smythies*, 2 R. & M. 717; *Attorney-General v. Drapers' Co.*, 6 Beav. 382; *Attorney-General v. Jesus College*, 29 Beav. 163.

(u) *Attorney-General v. Mayor of Bristol*, 2 J. & W. 308.

(x) *Attorney-General v. Beverley*, 6 H. L. Cases, 310; *Attorney-General v. South Molton*, 5 H. L. Cases, 1; *Attorney-General v. Trinity College*, 24 Beav. 483; *Attorney-General v. Dean of Windsor*, 24 Beav. 679; affirmed in H. of L., 6 Jur. N. S. 833, 8 H. L. Ca. 369.

(y) See Lord Brougham's observations in *Attorney-General v. Smythies*, noticed *supra*, 2 L. J. Ch. 58.

SECTION III.

RESULTING INTERESTS UNDER *EX FACIE* ABSOLUTE CONVEYANCES.

Doctrine of the
law of England.

Presumption
against donation
in Scotland.

Effect of con-
veyance of pro-
perty or its
securities by
tradition.

Distinction be-
tween completed
and uncompleted
donation.

1588. In the law of England there is a presumption in favour of donation in the case of *ex facie* absolute conveyances taken in the name of, or delivered to children of the granter; in the case of strangers or collateral relatives, the presumption is for a trust. But many exceptional circumstances are admitted, which have a tendency to alter these presumptions or to change the *onus* of proof. (z) It cannot be said that any exception to the maxim, *donatio non presumitur*, has been recognised by our Courts, in the case of questions arising between alleged donees and the general representatives of the defunct; (a) nor does it appear to us that there is any good reason for relaxing the operation of this rule of the civil law, upon the ground of presumed favour to any particular class of heirs. The existing practice is, that where a donation is alleged to have been made by delivery of a subject or document of debt, the claimant must take an issue of donation, (b) but if the donation is constituted by writing, it stands upon its own merits.

1589. Where the alleged donation is by way of tradition, as in that case a trust for the granter's representatives arises *ex lege*, and not upon a written declaration, parole evidence is of course competent to disprove the donation, and it is usually the only kind of evidence of which the case admits. Where the claimant's case is one of alleged delivery of a subject or security to a trustee or confidential person, for the purpose of handing it over to him, the competency of parole evidence depends on the circumstance whether the donation was completed in the lifetime of the truster. "There is an essential difference," as observed by Lord Cowan, "between the case of an attempt to enforce donation not completed in the lifetime of the donor, and the case of an attempt to set aside a completed donation; and this distinction, as regards the evidence that may be competent, becomes the more clear when the transaction has

(z) The doctrines of the English law in relation to resulting trusts upon conveyances are of a technical character; being based partly on the provisions of the Statute of Frauds, and partly upon principles established by decided cases, and which, however equitable in their results, can only be regarded in relation to Scotch jurisprudence, as arbitrary rules of construction. On this account, and also because the English authorities have never

been recognised in this department of jurisprudence, we have not thought it necessary to refer to them.

(a) Stair, 1, 8, 2; Ersk. 8, 8, 92; *Mackellar v. Hunter*, 5 March 1858, 20 D. 761; and see *Mackenzie v. Brodie*, 24 June 1859, 21 D. 1048; *Fyfe v. Kedslie*, 6 March 1847, 9 D. 858; *British Linen Co. v. Martin*, 8 March 1849, 11 D. 1004.

(b) *Wilkie v. Chalmers*, 16 June 1854, 16 D. 961.

been actually carried through, or is intended to be so, by the agency of a third party. . . . It comes then to be a mere pollicitated promise to donate, which cannot be enforced unless proved by writ or oath.”(c) It is impossible indeed to distinguish in principle between an unexecuted mandate to make a donation to a beneficiary and the ordinary case of a nuncupative legacy; to which case, accordingly, such mandates have been assimilated.(d) On the other hand, it has been settled that a mandate to execute a donation, if carried into execution in the lifetime of the mandant, may be proved by parole; because the title of the donee no longer rests upon the verbal promise, but is completed by delivery of the security itself.(e) As to donations of cash and corporeal moveables on deathbed, the rules of evidence are similar; the fact of possession in such circumstances being insufficient to constitute a *prima facie* title to the subject.(f)

1590. We pass to the consideration of proper conveyances *inter vivos*, as by indorsation of a bill,(g) assignation,(h) bond,(i) or disposition,(k) whether granted without consideration or for rational causes, *e.g.*, as provisions to the granter’s children, or to persons possessing the character of heirs. In such cases, as well as in the case of securities taken in name of the favoured individual, if delivery of the document has taken place, and still more if this has been followed by transmutation of possession, the presumption for donation arises on the face of the title, and a trust cannot be reared up except by proof *scripto vel juramento*, in terms of the Statute 1696, cap. 25.(l) Parole evidence has been admitted in one or two cases, where the grantee was also the trustee of the deceased.(m)

Donation constituted by deed *inter vivos* followed by delivery.

(c) *Mackenzie v. Brodie*, 24 June 1859, 21 D. 1048; see 1051.

(d) *Forsyth’s Trs. v. Maclean*, 18 Jan. 1854, 16 D. 343; *Barstow v. Inglis*, 5 Dec. 1857, 20 D. 230. See *Milroy v. Milroy*, 31 May 1808, Hume, 285. In one case, the delivery of a bill to a trustee for the purpose of being given up to the obligant was sustained as a discharge of the debt, although the mandate was not executed in the granter’s lifetime; *Barclay v. Fairly*, 13 June 1849, 11 D. 1138.

(e) *Mackenzie v. Brodie*, 24 June 1859, 21 D. 1048; *Ritchie v. Ritchie*, 6 June 1858, 20 D. 1093.

(f) *Little v. Little*, 28 Feb. 1856, 18 D. 701. But a transference of a tack and farm stocking to the granter’s son without writing, when the father was in *liege pousie*, was held to be a donation *quoad*

the stocking, in *Black v. Black*, 1795, Hume, 290.

(g) *Murray v. Todd*, 6 March 1848, Hume, 275. The presumption in favour of the donee will not apply unless delivery of the security in the defunct’s lifetime is proved; *Lord Advocate v. M’Neill*, 23 March 1866, 4 Macph. H. L. 20, reversing 2 Macph. 626.

(h) *Hay v. Angus*, 1795, Hume, 281. Here the assignation was held not to be subject to legitim. *Farquhar’s Trs. v. Stewart*, 27 Feb. 1841, 3 D. 658.

(i) *Dundas v. Dundas*, 12 June 1827, 5 Sh. 790, N. E. 731.

(k) *White v. White*, 28 Jan. 1841, 3 D. 468.

(l) But see *Kirkpatrick v. Bell*, 20 July 1864, 2 Macph. 1396.

(m) *Henderson v. M’Culloch*, 12 June

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But such decisions can hardly be supported on any sound principle of interpretation of the Statute 1696, cap. 25. Even as matter of probability, it is not very clear that a party clothed with a trust of all the property of which a settlor may die possessed is bound by the trust purposes, in a question regarding property delivered to him by the settlor in his lifetime. Where an assignment is shown to have been made for a valuable consideration, the donees (although heirs of the grantor) will only be permitted to retain the fund upon condition of implementing the contract.(n)

Where deed undelivered, whether the beneficial interest results to the heir.

1591. Next, where a security taken in the name of a friend or relative, or assigned or indorsed to him, has been retained by the deceased in his own hands, or in the custody of a neutral person, it is a question of intention whether the transaction is to be regarded as a donation or a trust. The death of the grantor is not equivalent to delivery in the case of deeds not *ex facie* of a testamentary nature; and it is obvious that undelivered deeds of conveyance do not fall within the scope of the statute 1696; for the grantor cannot be expected to call for a back-bond of trust in relation to a deed of security which he retains in his possession. The nature of the circumstances from which an intention to donate, or the contrary, may be inferred, will be best exhibited by a comparison of the more important cases; though, where so much depends upon intention, it is impossible to rely implicitly on any particular combination of circumstances as a precedent in similar cases.

In what cases donation is not to be presumed.

1592. In the first place, it is settled that the real proprietor may alter the destination,(o) or denude the nominal grantee, at any time during his life, if there has been neither delivery nor transmutation of possession.(p) Where a sum has been originally advanced on loan, a donation will not be presumed.(q) Sums advanced to children will be imputed in satisfaction of any claims they may have under their father's marriage-contract.(r) In *Keddie v. Christie*,(s) a deposit-receipt, taken by a father in name of one of his children, and found undelivered in his repositories after his death, was held to form part of the general executry estate;

1839, 1 D. 927. It ought to be added, that where a title is taken in the name of the wrong person, without the consent of the purchaser, the latter is entitled to prove his case *prout de jure*,—this not being a case of trust; *Waddell v. Waddell*, 17 March 1868, 1 Macph. 685.

(n) *Waddell's Trs. v. Waddell*, 20 June 1848, 5 D. 1288.

(o) *Jeffrey v. Aiken*, 11 Feb. 1831, 9 Sh. 423.

(p) *Dallas v. Leishman*, 1710, M. 16, 191; *Edgar v. Hamilton's Trs.*, 12 June 1828, 6 Sh. 963; *Fyfe v. Keddie*, 6 March 1847, 9 D. 858.

(q) *Guthrie v. Dunbar*, 7 June 1821, 1 Sh. 50, N. E. 54.

(r) *Murray v. Murray*, 5 Dec. 1848, 6 D. 176.

(s) *Keddie v. Christie*, 24 Nov. 1848, 11 D. 145.

and in *Heron v. M'Geoch*,^(t) trustees to whom the residue of the grantor's estate was bequeathed for their own absolute use, were found entitled to claim from one of their number the sums contained in certain deposit-receipts which had been delivered to him three years before the grantor's death, and which nearly exhausted the residue, the defender having failed to prove donation. In *Cruickshanks v. Cruickshanks*,^(u) a majority of the judges of the Second Division, affirming the judgment of Lord Rutherford, decided that an undelivered deposit-receipt, taken by a father in the joint names of himself and his son, or the survivor of them, could not receive effect as a donation. The want of delivery precluded the supposition of a donation *inter vivos*, and it could not be presumed without extrinsic evidence that a gift *mortis causa* was intended.^(x) Where a document of debt is taken in the name of two parties jointly, the Court will inquire from what source the money was advanced, and decree accordingly.^(y)

1593. On the other hand, it would appear that where the grantor stipulates for a reconveyance on demand, the circumstance of the donee having been made a party to the arrangement is equivalent to delivery; and therefore, if the grantor die without recalling the destination, the gift will take effect as a donation. This was the principle of the decision in *Fyfe v. Kedslie*, where a majority of the whole Court decided that a transference of bank stock *inter vivos* into the names of two of the grantor's nephews, who were among the residuary legatees, qualified by a back-letter, gave the donees a right to the stock, in addition to their shares of the residue.^(z) It would appear that an unqualified special assignation executed on deathbed, as, for example, a transference of a deposit-receipt in the bank books, is a good donation *mortis causa*; such conveyances, when executed *intuitu mortis*, being effectual, like testamentary writings, without delivery.^(a)

In what cases donation may be inferred from circumstantial evidence.

1594. We proceed to notice two recently decided cases, in which the effect of the laws of marriage and succession in modifying the construction of special destinations was the subject of consideration.

Marriage-contract provision settled by destination in a deed of title effectual as a donation *inter vivos*.

(t) *Heron v. M'Geoch*, 13 Nov. 1851, 14 D. 25. In questions as to indorsed deposit-receipts, the practice now is to grant an issue of donation, under which parole evidence is adduced on both sides; *Kennedy v. Rose*, 8 July 1868, 1 Macph. 1042; *Muir v. Ross' Exrs.*, 15 June 1866, 4 Macph. 820; *M'Cubbin's Exrs. v. Tait*, 31 Jan. 1868.

(u) *Cruickshanks v. Cruickshanks*, 10

Dec. 1858, 16 D. 168. See *Mackellars v. Hunter*, 5 March 1858, 20 D. 761.

(x) *Per* Lord Justice-Clerk Hope, 16 D. 169.

(y) *Cuthill v. Burns*, *infra*.

(z) *Fyfe v. Kedslie*, 6 March 1847, 9 D. 853.

(a) *British Linen Co. v. Martin*, 8 March 1849, 11 D. 1004; and see *Stair*, 4, 45, 17; *Ersk.* 8, 3, 91.

CHAP. XLVIII. In *Galloway v. Craig*,^(b) the House of Lords sustained a destination in a policy of life assurance to the wife of the assured, as a valid constitution of a postnuptial provision in favour of the wife ; and as the provision in this case was considered to be reasonable in amount, their Lordships held that the husband's bankruptcy did not revoke it. In *Cuthill v. Burns*,^(c) a deposit-receipt had been granted to a husband and wife, payable to the parties jointly and to the longest liver. In a competition for the fund between the wife and the husband's heirs, a majority of the judges of the Second Division dissented from Lord Mackenzie's ruling, to the effect that the wife was entitled to the sum in virtue of the destination, while sustaining her claim on the ground that the deposit was from her own funds. This reasoning has not satisfied us that the Lord Ordinary was wrong ; for though a receipt is not a testament, its terms may be evidence of a *donatio mortis causa*.^(d)

Destination to heirs and assignees in title-deeds do not vest an interest.

1595. Destinations to heirs and assignees in the titles of estates, being regarded as necessary words of style, mean no more than that the subject shall go to the heirs-at-law in the absence of any testamentary conveyance of the estate to other heirs. Accordingly, the rights represented by the trustees under a *general* trust-disposition and settlement are preferable to that of the heir-at-law under such a destination.^(e) And where a power was reserved to a father by his marriage-contract to distribute his estates amongst his children in such proportions as he pleased, and, failing such apportionment, his entire estate was to be divided equally amongst the children, the subsequent acceptance of a title to heritable property in favour of himself, his heirs and assignees, was held not to import an exercise of the power, as to this subject, in favour of his eldest son.^(f)

Extension of the doctrine to other cases of contract.

1596. Resulting interests are also raised upon conveyances *inter vivos* in other ways ; as in the case of an *ex facie* absolute disposition delivered to a creditor with the intention of making the property available as a security for advances ; in the case of a purchase by an agent who interposes his security for the price, and in the meantime takes a disposition to himself ; in the case of latent partnerships or interests in joint-stock companies. The fiduciary relations arising out of this class of transactions having already been

(b) *Galloway v. Craig*, 17 July 1861, 28 D. (Ap. Ca.) 12, 4 Macq. 267, reversing 22 D. 1211.

(c) *Cuthill v. Burns*, 20 March 1862, 24 D. 849.

(d) As to donation *mortis causa*, see Chap. 22, sect. 1 (Legacies).

(e) *Farquharson v. Farquharson*, 6 Paton 724, affirming M. 6596, 2290.

(f) *Jardine v. Jardine*, 22 Jan. 1850, 12 D. 505 ; see *Murray v. Murray*, 17 May 1826, 4 Sh. 589, N. E. 596, as to whether a life-interest was raised to a fee by a title-deed destination.

considered in treating of the Proof of Trusts under the Statute 1696, cap. 25, it is unnecessary to revert to the subject. (g) CHAP. XLVIII.

1597. If trustees invest funds in their own names for behoof of parties whose interest is afterwards found to be excluded by a preferable title, the resulting interest may be claimed by the preferable beneficiary directly from the trustees. (h) Accordingly, where trustees had taken securities in their own name for behoof of a legatee under the trust-settlement, and a competing claim by creditors under a marriage-contract was afterwards sustained, the Court, on the suggestion of Lord Rutherford, declared: "That the sums contained in the four several securities, and in the deposit-receipt, which are specially claimed by Mrs S. as having been invested or set apart by the trustees for her behoof, cannot be held as payments duly and irrevocably made to her, or placed beyond the power of the trustees or of the Court in this multiplepinding, in so far as these are required to be replaced in the ultimate accounting, in order to satisfy the claims of the widow and son as creditors under the marriage-contract, and the claim of the son for his legitim." (i)

Effect of mistake in destination of investiture or security title.

(g) See Chap. 47, sect. 1.

(h) *Buik v. Patullo*, 14 Nov. 1854, 17 D. 44.

(i) 17 D. 49, 50.

CHAPTER XLIX.

OF CONSTRUCTIVE TRUSTS.

Definition of
constructive
trusts.

1598. A constructive trust is said to be raised where a person clothed with a fiduciary character gains some profit or advantage by availing himself of his position as trustee. (a) For, as it is not permitted to a trustee to make profit by his office; it follows that, where such profit is shown to have been made, the estate or interest accruing to the trustee must be considered to have been acquired by him for the benefit of his constituents, and to be the subject of a constructive trust. (b)

Authorities cited
in support of
the general
doctrine.

1599. The doctrine is laid down as we have stated it in *Hamilton v. Wright*, (c) a case relating to the purchase of a security by a trustee. The trustee, it was observed, "was not under any legal disqualification from acquiring; but being trustee for the suspender, and bound as such to enlarge his and the creditor's funds, he could only acquire for behoof of the trust-estate. This was the general principle of the law of Scotland, not merely in the case of direct trustees, but of guardians, executors, etc., and of all those who are in the situation of being trusted for behoof of another." In delivering judgment in the same case on appeal, Lord Brougham observed, that the knowledge acquired by a trustee in reference to the subject of purchase was of itself a sufficient ground of disqualification, and of requiring that such knowledge be not only not used to the detriment of the trust, *but be not used for the trustee's own benefit.* (d)

1600. In the leading case of the *York Buildings Co. v. Mac-*

(a) Lewin on Trusts, Chap. 10. Stair, 1, 6, 17. The doctrine may be said to date from Lord Thurlow's celebrated judgment in the case of the *York Buildings Co. v. Mackenzie*, 13 May 1795, 3 Paton, 878.

(b) The principle is illustrated in an early case, *Sinclair v. Maxwell*, 1708, M. 16,186. The defender had undertaken to a friend to procure a legacy to be left to

him by a party with whom he had influence; but, instead of doing so, he obtained the legacy in his own favour. The Court held the defender bound to account for the fund.

(c) *Hamilton v. Wright*, 1 D. 673, per Lord Cockburn.

(d) *Hamilton v. Wright*, 2 Aug. 1842, 1 Bell, 574, see 591.

kenzie, it was observed by Lord Thurlow that it was supposed, on the one side, that the circumstance of the purchaser being common agent, created some legal disability in him to enter into the purchase at all, and that it was therefore unlawful, and must be cut down; that, on the other side, it seemed to be imagined that they had only to dispose of that objection, and prove that there was no rule which made a contract so entered into unlawful; but, disregarding both views, he had come to be of opinion that, while no man could be trustee for another but by contract, it was clear that under circumstances a man might be liable to all the consequences in his own person which a trustee would be liable to by contract. The contract of sale in this case, according to all the forms of it, was a valid and good one, and the estate was by that means vested in Mr Mackenzie; yet from the manner in which the estate was purchased, and under the circumstances of the case, in point of equity he ought to be compelled to reconvey.^(e)

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Lord Thurlow's dictum.

1601. The principle of putting a quasi-fiduciary construction on purchases by trustees in their own names was again recognised by the decision in *Fraser v. Hankey*,^(f) where it was observed by Lord President Boyle^(g) that there was no authority for holding "that such a purchase actually creates what may be termed a *labes realis*, or amounts to an absolute nullity." Lord Fullerton also,^(h) observing on the *York Buildings* case, said—"A trustee is understood to be acting rightly for the parties who are his constituents, and is therefore bound to hold for their behoof, and to account to them. That appears to be the principle on which the decision in the case of *Mackenzie* turned. When the case came back from the House of Lords, it did so with an order on Mackenzie, the common agent, to account with his constituents. It just seems to have been held there, that though Mackenzie, as common agent, had got possession of the estate, he was held as so possessing it for the creditors up to the time when he was compelled to reconvey." And to the same effect is the observation of Lord Colonsay,⁽ⁱ⁾ in *Laird v. Laird*—"The law will presume that the trustee intended that the profits should go to the beneficiary, rather than presume that he intended his own aggrandisement at the risk or expense of the beneficiary." It is apparent from the nature of constructive trusts, that such rights, arising, as they do, *quasi ex delicto*, are

Modern authorities.

^(e) *York Buildings Co. v. Mackenzie*, 13 May 1795, 3 Pat. 898.

^(g) 9 D. 423.

^(h) 9 D. 430.

^(f) *Fraser v. Hankey & Co.*, 13 Jan. 1847, 9 D. 415.

⁽ⁱ⁾ *Laird v. Laird*, 20 D. 981.

CHAPTER XLIX. not governed by the provisions of the Act 1696 as to proof. And this was expressly found in an early case. (*k*)

Purchases of trust-estate by trustees.

1602. The cases above cited, in illustration of the general conception of a constructive trust, serve to show that the law relating to purchases of the trust-estate by trustees forms a very important part of the subject. As it will be necessary to treat more fully of such purchases in the discussion of the subject of the duties of trustees for sale, (*l*) it is not necessary to enter here upon a review of the cases.

Renewal of leases by trustees.

1603. One of the applications of the doctrine of constructive trust, which appears to be of considerable importance in English practice has relation to the renewal of leases; the rule being, that if a trustee or agent renew a lease in his own name, he shall be held to have taken it in trust for the parties interested in the original lease. (*m*) The rule is so strictly enforced, that even if a proprietor should refuse to grant a renewal in favour of a minor beneficiary, and the trustee thereupon renews the lease in his own name and for his own benefit, the Court will oblige him to assign it to the minor. (*n*) The Scotch cases upon renewals of leases (*o*) are of no great interest,

(*k*) *Spreul v. Crawford*, 1741, Elchies, "Adjudication," No. 30.

(*l*) See Chap. 64, sect. 3.

(*m*) See Wh. & T. L. C., *infra*.

(*n*) *Keech v. Sandford*, Sel. Ch. Ca. 61, 1 Wh. & T. L. Ca., 8d ed. 39. A lessee of the profits of a market had devised to a trustee for an infant; and the trustee having been refused a renewal in name of the infant, took a lease for the benefit of himself. The Court of Chancery held that there was a constructive trust for the infant. Lord King observed—"If a trustee, on the refusal to renew, might have a lease to himself, few trust-estates would be renewed to *cestui que use*. This may seem hard, that the trustee is the only person of all mankind who might not have the lease; but it is very proper that the rule should be strictly pursued, and not in the least relaxed." A few of the leading decisions on this important topic (selected from White & Tudor's Leading Cases, pp. 40-50) may be noted:—

Life Interests.—Testator bequeathed leaseholds to his widow for life, with remainder over; the leases expired during the life of the widow, who renewed; held that the new leases were subject to the trusts of the will; *James v. Dean*, 11 Ves. 383, 15 Ves. 286. A tenant for life of renewable lease-

holds had a general power of appointment, which she did not exercise; held that a renewal in her own name, not being an execution of the power, enured at her death to the remainder man; *Brookman v. Hales*, 2 V. & B. 45.

Joint Owners.—If one of several renew in his own name, he will hold in trust for the entire body; *Palmer v. Young*, 1 Vern. 276; *ex parte Grace*, 1 B. & P. 376.

Partners.—"One partner cannot treat privately and behind the backs of his co-partners for a lease of the premises where the joint trade is carried on, for his own individual benefit; if he does so treat, and obtains a lease in his own name, it is a trust for the partnership;" *per* Sir W. Grant in *Featherstonehaugh v. Fenwick*, 17 Ves. 311.

Mortgages.—If either the mortgagor or the mortgagee renew, the new lease will be held a graft on the old one for the respective interests of both parties; *Rushworth's case*, Freem. 12, Finch. 392, 2 Ch. Rep. 113; *Smith v. Chichester*, 1 C. & L. 486.

Agents.—In such transactions agents are dealt with as trustees; *Edwards v. Lewis*, 8 Atk. 538; *Mulhallen v. Marum*, 8 D. & W. 317, where the transaction was set aside by Sir E. Sugden, Lord Ch. of Ireland.

(*o*) *Wilsons v. Wilson*, 1789, M. 16,376; *Bee v. Wallace's Exrs.*, 1745, M. 6008, 6011;

except as establishing the doctrine of constructive trusts, which ap- CHAPTER XLIX.
 pears indeed to have been recognised at a very early date. In a case which was decided so far back as 1632, the principle was raised very purely. The factor to a tutor had obtained a tack of teinds in favour of his wife in liferent and the tutor's ward in fee. It appeared that the lady had a liferent over a part of the lands, as to which therefore her right to obtain the tack was undisputed. "But for the teinds of the rest of the lands of the minor, whereof she had no liferent, the Lords found that the benefit of the tack in that ought to accresce to the minor and not to the conjunct fiar (the factor's wife), nor to the factor nor to the tutor, the minor always paying a proportion *pro rata* of the grassum of the tack."(*p*) And where the widow of a tenant had continued the possession of the farm after her husband's death, and subsequently obtained a renewal of the tack in her own name, it was decided that the right to the new lease belonged to her daughters, who were entitled, as heirs-portioners, to succeed to their father's possession.(*q*)

1604. In another case, it appeared that the tutor-at-law of the children of a deceased tenant had executed a renunciation of the subsisting tack, and, in consideration thereof, had obtained a new lease in his own name for fifteen years, which was again renewed just before the tutory expired. After having by these transactions acquired a fortune of several thousand pounds, he was sued by his wards for repayment of the profits of the occupation, and although some of the judges were of opinion that the defender was only bound to restore the "surplus rents," a majority of the Court, after repeated argument, held that the defender was bound to account for the *profits* of the possession for the whole period of the currency of both leases.(*r*) The case of *Parkhill*, decided on appeal by Lord Bathurst,(*s*) appears to be exceptional in its circumstances and not to touch the principle; there the renewal of the lease was not obtained by the curator until after the beneficiary had attained to majority; and although it was pleaded that the latter was absent on foreign service at the time of the renewal, it was clear that, for that very reason, he would not have succeeded in obtaining a renewal of the lease for himself.(*t*)

1605. Where a renewed lease is assignable, and is disposed of to an onerous purchaser, it may be assumed that the title of the Rights of onerous assignees not affected.

Parkhill v. Chalmers, 1771, M. 16,865, 12 Feb. 1773, 2 Pat. 291; *Seth v. Hain*, 14 July 1855, 17 D. 1120.

(*r*) *Wilson v. Wilson*, 1789, M. 16,376, 16,378.

(*s*) *Parkhill v. Chalmers*, 12 Feb. 1773, 2 Pat. 291.

(*p*) *Ludquhairn v. Haddo*, 1632, M. 9503.
 (*q*) *Bee v. Wallace's Exrs.*, 1745, M. 6008.
 See p. 6009.

(*t*) 2 Pat. 296; and see M. 16,865.

CHAPTER XLIX. purchaser will stand good, according to the principle recognised in the case of purchases by trustees, (u) the beneficiary having his remedy in the form of damages. But if the original lease were registered under the Leases Act 1857, (x) which provides for the registration of renewals, as in a progress of titles, the title might come to depend upon the means which the register afforded of discovering the fraud.

Renewal of leases by tutors and quasi-trustees.

Immaterial that the terms of the new lease are different.

Exceptional cases.

1606. We have seen that the principle of constructive trust is not confined in its application to proper trusts, but extends to every kind of fiduciary relation. And accordingly, if a tutor, (y) curator, (z) interdictor, (a) executor, (b) assignee in security, (c) or factor acting under the authority of a trust, (d) renew a lease on his own account, he will be deemed to hold it as a constructive trustee for his constituents. And although a trustee should be individually interested in the leasehold subject, he is in no better position in respect to the right of renewal than an ordinary trustee, for equity will not permit a person, who has duties to perform towards others in the same position as himself, to avail himself of his situation to obtain a disproportionate advantage at their expense. (e) In the cases cited, the rule was applied where the renewal was for a different term and at a different rent; (f) also where the original lease had expired, the landlord being under no obligation to renew; (g) and where a reversionary right was reserved to the beneficiary. (h) In a case where the lease in question was not properly a renewal, but an original tack of the teinds of the trust-estate, the trustee was obliged to refund. (i) The same equitable principle was enforced where an interdictor had obtained a renewal of a wadset in which his constituent was creditor. (k)

1607. Where the ground of action is, that a trustee, or creditor in possession, has obtained a renewal of a lease in his own name, pursuant to a renunciation by the tenant himself, and subject to an obligation to account, the trust can only be proved by writ or oath in terms of the Statute 1696. (l) If a beneficiary acquiesce in the trustee's discharge for any considerable time, he will be held to have abandoned his right of redress. (m)

(u) *Fraser v. Hankey*, 18 Jan. 1847, 9 D. 415.

(x) 20 & 21 Vict., cap. 26, § 17.

(y) *Wilsons v. Wilson*, M. 16,376.

(z) *Parkhill v. Chalmers*, 2 Pat. 291.

(a) *Campbell v. Campbell*, 1761, M. 7156.

(b) *Bee v. Wallace's Exrs.*, M. 6008.

(c) *Seth v. Hain*, 14 July 1855, 17 D. 1120.

(d) *Ludquhairn v. Haddo*, M. 9503.

(e) *Ibid*; *Parkhill v. Chalmers*, M. 16,365, 2 Pat. 291.

(f) *Wilsons v. Wilson*, M. 16,376.

(g) *Bee v. Wallace*, M. 6008.

(h) *Ludquhairn v. Haddo*, M. 9503.

(i) *Ibid*.

(k) *Campbell v. Campbell*, M. 7156.

(l) *Seth v. Hain*, 17 D. 1117.

(m) *Robertson v. Scott*, 8 July 1834, 12 Sh. 875.

1608. It appears from the above mentioned decisions, that a trustee renewing a lease in his own name is not only bound to assign the right to his constituent when required, but is also accountable for the profits of his occupation.⁽ⁿ⁾ The trustee is, of course, entitled to all necessary allowances for rents and expenses of management, including the grassum or consideration paid for the renewal of the lease.^(o) It would also seem that he is entitled to some allowance for his personal services in the management and cultivation of the farm.^(p)

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Trustee held bound to account for the profits.

1609. In the rule that a trustee who purchases debts due by his constituent, acquires them for behoof of the estate, we have another application of the doctrine of constructive trust;^(q) for, said Lord Campbell, in a leading case on this subject, it was clear that a trustee could not purchase the bond for his own benefit, nor could his representatives sue upon it for the benefit of his estate; and the obligor having offered to pay, or having paid back the purchase money, with interest, the trustee could have no further claim against him.^(r) The rule applies to all persons holding an office or situation of trust, as testamentary trustees,^(s) trustees for creditors,^(t) tutors and guardians,^(u) factors,^(x) agents,^(y) and persons acting in the character of *negotiorum gestor*.^(z) The beneficiary is entitled to all collateral benefits arising from the purchase; and accordingly, it was found that the legal of an apprising, purchased by a trustee, could not be held to be expired, to the effect of vesting the beneficial right to the estate in his person.^(a) And where a truster included, in a trust-disposition of his estates, an acre of ground which did not belong to him, and the trustee afterwards obtained a gratuitous conveyance of it from the proper owner, it was found that the right to the said acre of ground accresced to the beneficiary.^(b)

Purchases of debts by trustees.

1610. The liability of a trustee purchasing debts is not affected by the circumstance of the trust being confined to any special description of property;^(c) or of the debts in question having been

Doctrine not to be qualified in exceptional cases.

⁽ⁿ⁾ *Wilson v. Wilson*, *Bee v. Wallace*, *ubi, supra*; *Thoirs v. Tolquhoun*, 1686, M. 16,305, 16,308. See also *Cochrane v. Black*, 1 Feb. 1855, 17 D. 821; *Laird v. Laird*, 26 June 1855, 17 D. 984, as to the principles upon which the accounting is to be made.

^(o) *Ludquhain v. Haddo*, M. 9504.

^(p) M. 16,378; but see *Bee v. Wallace*, M. 6012 (Kilkerran).

^(q) *Stair*, 1, 6, 17.

^(r) *Hamilton v. Wright*, 18 March 1839, 1 D. 668; reversed 2 Aug. 1842, 1 Bell, 574. 592.

^(s) *Maxwell v. Maxwell*, 1667, M. 16,166.

^(t) *Hamilton v. Wright*, *supra*; *Rae v. Glass*, 1673, M. 16,170; *Ogilvie v. Lyon*, 1729, M. 16,200; *E. of Crawford v. Hepburn*, 1767, M. 16,208.

^(u) *Wright v. Wright*, 1712, M. 16,198.

^(x) *Murray v. Murray*, 1710, M. 9504.

^(y) *Corsan v. M'Gowan*, 1736, M. 9504.

^(z) *Spreul v. Crawford*, 1741, Elchies, "Trust," No. 1; "Adjudication," No. 80.

^(a) *Ogilvie v. Lyon*, 1729, M. 16,200.

^(b) *Cochrane v. Cochrane*, 1732, M. 16,339.

^(c) *Maxwell v. Maxwell*, M. 16,166.

CHAPTER XLIX. incurred after the constitution of the trust; or of the purchase having been made openly, and with the tacit consent of the beneficiary. (d) It would seem that, in the case under consideration, a trustee purchasing a bond would not be entitled to use diligence against his constituent on the clause of registration, even to the effect of obtaining repayment of the sum advanced; (e) but he might recover it as a debt by ordinary action, or take credit for it in his accounts as money advanced to the trust. In this view of his position, there seems to be some room for criticism upon the decision in the sequel of *Hamilton's* case, (f) to the effect that the trustee could not set off a sum of £2000, which he had paid for his constituent's bond—the subject of litigation—in compensation of his constituent's claim for the expenses of the action.

Spreul v. Crawford.

1611. It is interesting to observe, that as early as the case of *Spreul*, in 1741, (g) a very correct view was taken of the nature of a constructive trust. The defender in that case having taken upon himself the management of the property of his minor relatives, and having, during the subsistence of that relation, purchased an adjudication over one portion of the minor's estate, and taken a gratuitous disposition to another part of it, the Lords would not entertain a declarator of trust as to the lands disposed in fee-simple (though they afterwards reduced the conveyance); but as to the purchase of the adjudications, they had no hesitation in affirming that the Statute of 1696 did not apply. The distinction taken by President Forbes and Lord Arniston did not depend altogether on the circumstance of *Spreul* being a *negotiorum gestor*—for an express trustee would equally have been precluded from acquiring debts for his own benefit—but on the rule by which the relation of a constructive trust is impressed upon all transactions by means of which a trustee is enabled to gain an advantage at the expense of the trust-estate.

Possession of title-deeds as affected by constructive trusts.

1612. An agent is so far a constructive trustee that he cannot use his lien upon title-deeds put into his hands for a special purpose for the purpose of enforcing a claim arising upon a previous transaction. In the case of *Allan v. Sawers*, (h) certain trustees, in consideration of the sum of £900, assigned to the defender a heritable bond for that amount, and became bound for the punctual payment of the interest. The property having afterwards been brought to sale, Allan, who had acted as agent for both parties in

(d) *Hamilton v. Wright*, 1 Bell, 591, 592, *per* Lord Brougham.

(e) *Ibid.*

(f) *Wright's Trs. v. Hamilton*, 7 Dec. 1848, 6 D. 185.

(g) *Spreul v. Crawford*, 1741, Elch.

"Trust," No. 1; "Adjudication," No. 80; and see the narrative of this case in *Marshall v. Lyall*, 18 Feb. 1859, 21 D. 521.

(h) *Allan v. Sawers*, 8 June 1842, 4 D. 1856; *Inglis v. Moncrieff*, 7 Feb. 1851, 13 D. 622.

the loan transaction, and who was also one of the trustees, attempted to enforce his lien against the property; but it was held that he could not come forward in his professional capacity, or use his rights acquired in that character to defeat the security on the faith of which he had invited the lender to advance the money.⁽ⁱ⁾ “An agent,” said Lord Fullerton, “who joins in bonds containing an assignation to the title-deeds, does by the clearest implication depart from any claim of lien on these title-deeds—a claim which can be urged and made effectual only by obstructing the creditor’s right, which the agent has bound himself to fortify and make good.”^(k)

1613. These cases are closely allied to the rule laid down by Lord Corehouse in *Wilson v. Lumsdaine*,^(l) and confirmed by subsequent decisions,^(m) that an agent who acts for both parties in any onerous transaction is not at liberty to retain the title-deeds as against one of those parties in order to enforce payment of an account due by the other. The principle, as stated by that learned judge, is, that “where a man acts in the double capacity of agent for two parties having opposite interests, like a borrower and lender, he incurs serious responsibilities, and it is the duty of the Court to see, as far as possible, that the safety of one or other of his clients is not thereby compromised.”⁽ⁿ⁾ And in the case of *Gray v. Wardrop* it was observed, “that when an agent undertakes the solemn duty of acting for both lender and borrower, he must never lose sight of the delicacy of his position, and he is bound to make the fullest disclosure to the lender of everything that can affect the security.”^(o)

Duty of agent acting for parties having conflicting interests.

1614. The rule is not confined to the case of a lien for accounts incurred prior to the conveyance; it frees the titles from all claims against the lender for accounts subsequently incurred by the borrower to his agent, provided the bond contains a clause of delivery of writs. In *Paterson v. Currie* it was observed, that after the transaction was completed, the titles remained with the agent for behoof of the heritable creditor; though, whether his happening to be agent for both parties might have the effect of inducing a double possession, might be doubted.^(p) Although the borrower’s agent should enter into direct communication with the lender, he is not

Doctrine of constructive trust applied to law agent’s lien.

(i) 4 D. 1359.

(k) *Inglis v. Moncrieff*, 18 D. 627.

(l) *Wilson v. Lumsdaine*, 29 June 1837, 15 Sh. 1211.

(m) *Paterson v. Currie*, 8 July 1846, 8 D. 1005; *Gray v. Wardrop’s Trs.*, 21 May 1851, 13 D. 963.

(n) *Wilson v. Lumsdaine*, 29 June 1837, 15 Sh. 1218. In *Marshall v. Mollison*, 7

Dec. 1864, 3 Macph. 191, it was held that a party who had obtained possession of a deed in the capacity of agent for another, was not entitled to use it for his own purposes, viz., for the purpose of obtaining himself served heir to his father.

(o) 13 D. 970, per Lord President Boyle.

(p) *Paterson v. Currie*, 8 July 1846, 8 D. 1010.

CHAPTER XLIX. bound to disclose the existence of a lien unless he expressly undertake the duty of agent for both parties.(q) Where an agent in a loan loses his lien over the title-deeds, by neglecting to make it a matter of special stipulation with the lender, the right in question lapses irrecoverably, and cannot be maintained even by the trustee on the agent's sequestrated estate.(r)

Specialty in case of obligation to exhibit titles.

1615. The ordinary obligation to produce title-deeds to parties interested, seems to be more a matter of direct stipulation than of implied trust. It does not occur to us that the power of inspecting such documents can be claimed as a right; unless perhaps by joint proprietors; but of course, a diligence may be obtained where a right is the subject of litigation. A heritable creditor to whom writs have been assigned, to the effect of maintaining his right, is not entitled to demand a loan of the titles, until the term of payment has arrived, even to enable him to carry through an assignment of the security.(s) And it is doubtful whether a creditor to whom title-deeds have been delivered as an additional security, may not refuse to produce them to the proprietor, except upon condition of repayment of the debt.(t) The tendency of the decisions is to support the interest of the party in possession of the titles.(u)

Constructive trusts arising upon policies of insurance.

1616. In *Dalgleish v. Buchanan*,(x) the question was raised, but not determined, whether a tradesman who recovers under a general insurance of his stock in trade, etc., including goods "in trust or on commission," was bound to communicate the benefit of the policy to customers whose goods were destroyed upon his premises, assuming that there was a surplus beyond what was necessary to compensate his individual losses. Lord Ivory doubted whether the insurance office could be compelled to pay the surplus to the policy-holder, since it was not apparent that the latter had any proper insurable interest in goods in trust or on commission in his premises; but thought that, if the company did pay what they were not bound to pay, it would be difficult for the owner of the goods to establish a right to such a windfall.(y) If the claim in such a case be maintainable at all, we apprehend it can only be stated as raising a constructive trust in the person of the holder of the policy (the depositary), regarding him as a trustee of the articles

(q) *Clarke v. Morrison*, 29 Nov. 1887, 16 Sh. 133.

(r) *Inglis v. Moncreiff*, 7 Feb. 1851, 13 D. 622.

(s) *Hamilton v. Brown*, 15 May 1839, 1 D. 725.

(t) *Malcolm v. Carmichael*, 9 March 1854, 16 D. 825; 2 Bell's Com., 5th ed., 38.

(u) *Hamilton v. Brown*, *Malcolm v. Carmichael*, *ubi supra*; *M'Neill v. Blair*, 17 Nov. 1835, 14 Sh. 14; *Dobie v. Scales*, 19 May 1831, 9 Sh. 609; *Robertson v. Blackwood's Trs.*, 10 July 1852, 1 Stuart, 1014.

(x) *Dalgleish v. Buchanan*, 17 Jan. 1854, 16 D. 332.

(y) 16 D. 337.

sent by customers for repair, and therefore bound to communicate advantages incident to the relation. CHAPTER XLIX.

1617. A liferenter may be considered as being in a certain sense a trustee of the property for the *fiar*; and if he commit waste, by unfair leasing, or exhaustion of the subject, he will be liable as for a breach of trust. The same observation may be made in relation to heirs of entail.^(z) “I conceive,” said Lord Redesdale, “one can scarcely put the situation of an heir of entail, in a Scotch entail, with a power of granting leases, in a higher situation than a trustee. If you consider him a trustee in executing that power, he should so execute it as to have regard to the interest of his successor. . . . If a trustee, in such a situation, had granted leases of this description, though they were really to the prejudice of the succeeding heir of entail, does it follow that damages can be recovered against the estate, and against the trustee, who has acted without an intent to injure the succeeding heir of entail?”^(a) But his Lordship, as well as Lord Eldon,^(b) were of opinion, that if leases were renewed at an unreasonably low rent, the heir would be liable in damages. Such a claim would not readily be entertained where no *grassum* was taken; and great weight would always be given to the element of *bona fides*.

^(z) *Marq. of Queensberry v. Montgomery*,
(*Tinwald case*) 26 May 1820, 6 Pat. 551.

^(b) 6 Pat. 577; and see *Muirhead v. Young*, 13 Feb. 1858, 20 D. 592.

^(a) 6 Pat. 567.

Duties of life-
renter as a trustee
for the *fiar*.

CHAPTER L.

TRANSMISSION OF BENEFICIAL INTERESTS BY DEED
OR OPERATION OF LAW.

- I. *Assignment and Disposition* inter vivos. | III. *Descent to Heirs and Executors.*
II. *Testamentary Disposition.* | IV. *Diligence against the Trust-Estate.*

SECTION I.

ASSIGNMENT AND DISPOSITION OF BENEFICIAL INTERESTS BY DEED
INTER VIVOS.(a)

Division of the subject.

The questions that require to be noticed have relation, *first*, to the assignable quality of the beneficial interest ; and, *secondly*, to the effect of intimation, and to questions of priority of title.

Vested interests transmissible by assignation, or disposition and assignation.

1618. I. OF THE ASSIGNABLE QUALITY OF THE BENEFICIAL INTEREST.—It is a general rule of law, that any vested interest, although not in the possession of the beneficiary, is capable of being transmitted by assignation ; or, if the interest is of an heritable nature, by disposition and assignation. Interests in trust-estates are subject to the same rules, with respect to the form of transmission, as debts ; and therefore a simple assignation, not intimated, will be effectual as an obligation against the cedent ; but it will neither divest him, nor secure a preference to the assignee in a question with a subsequent assignee or arresting creditor.(b) It would be foreign to our subject to enter upon a discussion of the requisites of assignation and disposition, and the completion of a title by intimation or its equipollents. It is sufficient to notice how, and in what manner, the assignable quality of the beneficiary's interest may be affected by the trust.

(a) A digest of the English authorities on the assignable character of equitable estates will be found in 2 Tudor's Leading Cases, 3d ed. 706 *et seq.* ; but on a subject which is so closely connected with a techni-

cal branch of law—Conveyancing, English cases can be of no value as precedents.

(b) See, for example, *Maxwell v. Wylie*, 25 May 1837, 15 Sh. 1005 ; *Forbes v. Luckie*, 26 Jan. 1838, 16 Sh. 374 ; *Wilson v. Wilson*, 9 July 1742, 4 D. 1503.

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1619. A *spes successionis*, or contingent right, may be assigned, but the assignment will be operative only in case the right becomes vested.(c) If, on the contrary, the cedent's interest lapses by the predecease of the legatee or the occurrence of an adverse contingency, no right passes.(d) In a large proportion of the decided cases on vesting, the question at issue was, whether the beneficial interest had vested so as to be carried by a previous assignation or testamentary disposition.

Effect of assignation of a *spes successionis*.

1620. In a destination of a legacy to a legatee, his heirs and assignees, the term *assignees* is understood to apply to assignees of the vested interest; and therefore, if the legatee predecease the testator, the legacy will not go to the executor of his will, but to the heir or next of kin, according to the nature of the subject.(e) And the same rule obtains in regard to the execution of powers of disposal of equitable interests. A deed of disposal by a party who has merely a possibility of obtaining the power, will be effectual if the power afterwards vest, but not otherwise.(f) An agreement to sell an interest, which is not vested, has the same effect as an assignation of the interest in a question with the cedent.

Construction of term assignee in a substitution.

1621. An assignation of a beneficial interest which is already vested, takes effect immediately, even where the payment or delivery of the subject is postponed to a future period. If followed by intimation, it divests the cedent of the entire personal right; and even though not intimated, it is effectual as an agreement to convey his entire interest, including subsequent accessions. For example, if the legatee of the reversion of a fund which is burdened with a liferent, assign his interest, no question can afterwards be raised as to the value of the interest at the time of the assignation; for the thing that was assigned was the right as it stood in the cedent, whether of fixed amount, indefinite, or unascertained.(g)

Effect of assignation of an interest which is vested, but not immediately payable.

1622. It is to be observed that, although a disponent of lands may transfer his personal *title* to another by merely assigning the disposition, yet a party who has a personal *right* to heritable property, *e.g.*, a right to demand a specific conveyance of heritable subjects from the trustee, can only convey it effectually by using dispositive words. When, therefore, a conveyance is contemplated of a

Personal right to lands can only be transferred by dispositive words.

(c) See *Wood v. Begbie, etc.*, 17 June 1850, 12 D. 963.

(d) *Johnstone Beattie v. Johnstone's Trs.*, 7 Feb. 1868. A husband having assigned his interest in a fund settled by the wife's father on the occasion of his daughter's marriage, the forfeiture of the husband's interest by divorce was held to apply to the assignee.

(e) *Wilkie v. Wilkie*, 27 Jan. 1837, 15 Sh. 480; *Bell v. Cheape*, 21 May 1845, 7 D. 614; see also *Robertson v. Pattinson*, 18 Aug. 1846, 5 Bell, 259.

(f) *Infra*, sect. 2.

(g) *Pattinson v. Robertson*, 5 March 1844, 6 D. 944; *Stainton v. Stainton's Trs.*, 25 Jan. 1850, 12 D. 572; *Mitchell v. Major*, 12 Nov. 1856, 19 D. 30.

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beneficial interest in a trust consisting wholly or partially of heritable estate, it will be proper in all cases to make use of the words "dispone and assign," unless the parties to the transaction are anxious to raise a question as to the heritable or moveable quality of the interest. (*h*)

Whether an equitable or beneficial interest can be entailed.

1623. A beneficial interest in lands and heritages may be made the subject of an entail, if the fee, in contemplation of law, remains in the beneficiary; as, for example, where the proprietor of the estate has conveyed it to trustees for payment of his debts, without disposing of the reversionary interest, in which case an entail may be effectually made of the reversionary estate by the granter of the trust or his heir, notwithstanding the subsistence of the trust. The reports present many instances of the execution of deeds of entail and other dispositive settlements under such circumstances. (*i*) If the fee of the estate is in the trustee, a dispositive conveyance of the estate itself by the beneficiary would seem to be inappropriate, as he has only the right, and not the title, of heritable proprietor. A disposition of the estate would, however, receive effect as a conveyance of the beneficial interest. (*k*) If this doctrine be correct, it follows that an entail executed by a party in right of the beneficial interest would be a good assignation to the institute or first taker; and it is thought that it ought on principle to be binding upon the first taker, as a trust, to execute an effectual entail of the estate. Indeed, it may fairly be maintained, on the construction of the Entail Statute, that a disposition of the beneficial interest, subject to the statutory prohibitions, is capable of receiving effect as a valid entail of the heritable interest under the trust, so that the heir should not be *in titulo* to demand a conveyance from the trustees except under the conditions of an entail. (*l*)

(*h*) If the beneficiary convey the estate itself, supposing his title to be complete, the conveyance will be effectual as an assignation of his equitable interest; *Paul v. Boyd's Tr.*, 22 May 1835, 18 Sh. 818.

(*i*) See *M'Millan v. Campbell*, 14 Aug. 1834, 7 W. & S. 441, affirming 9 Sh. 551; *Cunninghame v. M'Leod*, 18 Aug. 1846, 5 Bell, 210, affirming 3 D. 1288, and cases cited, chapter 45 (Radical Right).

(*k*) A beneficiary of property directed to be entailed, may burden the life interest with provisions in the same manner as if an estate had been actually purchased and conveyed to the heirs under the fetters of an entail; that is, assuming the period to

have arrived at which the entail ought to have been executed; *Stainton v. Stainton's Trs.*, 25 Jan. 1850, 12 D. 571.

(*l*) See Lord Moncrieff's note in *M'Millan v. Campbell*, 4 March 1831, 9 Sh. 554; and the cases of *Livingston* and *Denholm*, there referred to. No opinion was expressed in the House of Lords as to the competency of entailing a personal right to heritable property according to the law of Scotland; but Lord Wyndford observed, that in similar circumstances a Court of Equity in England would compel the person in whom the legal estate was vested, to complete the conveyance; 7 W. & S. 451.

1624. A liferenter(*m*) or joint-owner(*n*) can only assign the precise interest that he himself has in the estate. On the death of the cedent, therefore, the interest will pass, in the one case to the fiar, and in the other to the remaining joint-owners.

Assignment of beneficial life interests.

1625. As to assignments of beneficial interests in personal property, no special form of assignment is necessary. A bill of exchange drawn upon and presented to the trustees is a good assignment of the funds of the beneficiary in their hands.(*o*) Professor Bell indicates an opinion, that the assignation of a bill or other debt due by the truster to the beneficiary does not give the assignee a right to dividends declared by the trustee in a voluntary trust;(*p*) and it has been settled that dividends due under a sequestration are not carried by an assignation of the debt subsequent in date to the sequestration, the rule being, that all diligence begun must be separately assigned.

Form of assignation of beneficial interests in personalty.

1626. The legal assignments, as marriage, bankruptcy, and judicial assignments, are operative upon beneficial interests in the same manner as upon other personal rights. Where the question was between creditors of a husband claiming the wife's legitim, as falling under the *jus mariti*, and the wife herself claiming provisions of larger amount than the legitim being given to her, exclusive of her husband's *jus mariti*, the Court sustained the exercise of the power of election by the wife in her own favour.(*q*) It has not yet been decided whether creditors can compel the donee of a general power to exercise it by conveying the property to a trustee for their behoof.(*r*)

Transmission of beneficial interests by legal assignments. Election.

1627. II. OF INTIMATION AND THE COMPLETION OF A TITLE.—A beneficiary is divested of his interest in personal estate by assignation duly intimated to the trustees; and it would seem that intimation to a single trustee, or to a factor on the trust-estate, may be sufficient to complete the title of the assignee, though certainly not to put the other trustees in *mala fide*, in the event of their paying to a subsequent assignee.(*s*) The title of the assignee to the subject being completed by intimation, it follows that his right is preferable to that of subsequent arresters claiming through the beneficiary.

Intimation necessary to divest the beneficiary.

(*m*) *Stewart's Trs. v. Stewart*, 20 Dec. 1851, 14 D. 298; see *Hamilton v. M'Gie*, 7 June 1828, 6 Sh. 982.

(*n*) *Robertson v. Menzies*, 10 Mar. 1857, 19 D. 671.

(*o*) *Watt's Trs. v. Pinkney*, 21 Dec. 1853, 16 D. 279; *Carter v. M'Intosh*, 20 March 1862, 24 D. 925.

(*p*) 2 Bell's Com., 5th ed. p. 20.

(*q*) *Lowson v. Young*, 15 July 1854, 16 D. 1098; *Stevenson v. Hamilton*, 7 Dec. 1836, 1 D. 181.

(*r*) See the opinions in *Rollo v. Rollo*, 26 Jan. 1848, 5 D. 446.

(*s*) *Earl of Aberdeen v. Earl of March and Others*, 9 April 1780, 1 Cr. & St. & P. 44; Stair, 3, 1, 10; 4, 40, 83; More's Notes, BB.; Ersk. 3, 5, 5.

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Beneficiary not divested of the equitable interest in heritable property until infestment.

1628. Beneficial interests in heritable estate stand in a somewhat different position. A disposition and assignation of a personal right to heritable estate, the title to which stands in the person of a trustee, does not communicate to the assignee a right capable of being completed by infestment. To complete his title, he must therefore either obtain a conveyance from the trustee, or adjudge the estate itself in implement of the assignation. It is not necessary, however, that the assignee of a beneficiary should have his title feudally completed in order to the acquisition of a preference. On the contrary, the intimation of an onerous disposition and assignation of the beneficial interest in heritable estate, entitles the assignee to rank preferably to subsequent adjudging creditors.^(t) It would seem that even where the right is fully vested, and the beneficiary is therefore in a position to demand a conveyance, an intimated assignation of his interest would suffice to secure a preference in bankruptcy.^(u)

Questions of preference between assignees of beneficiary and of trustee.

Express trusts.

Latent trusts.

1629. We have still to consider whether the assignee of a beneficiary is entitled in any circumstances to a preference over assignees of the trustee. This question is, by the maxim *assignatus utitur jure auctoris*,^(x) resolved into the more simple inquiry, whether the right of the beneficiary himself is liable to be defeated by the fraudulent assignment of the trustee? Here a distinction must be taken between declared and latent trusts. In the former class of trusts, which includes conveyances expressed to be in trust for purposes declared in a relative writing, the title of assignees of the trustee is measured by the terms of the whole settlement; and therefore, if the trustees have power to sell and convert the estate into money, onerous assignees of the trustee have a preferable right to the specific estate, and the claim of the beneficiary lies against the funds into which the estate is converted. If the trustees have no power of disposal, but are bound to convey the estate specifically, purchasers from them may be dispossessed by the beneficiary or his assignee. In the case of a latent trust, that is, a trust constituted by *ex facie* absolute disposition—and it is immaterial whether the purposes are embodied in a back-bond or not—a purchaser from the trustee is not affected by the conditions of the latent trust, and his right is therefore preferable to that of the beneficiary or his assign-

(t) *Russell v. Macdowell*, 6 Feb. 1824, F.C.; *Morrice v. Sprot*, 27 June 1846, 8 D. 918.

(n) See *Paul v. Boyd's Trs.*, 22 May 1835, 13 Sh. 818.

(x) The word *jus* here, must be understood in the sense of title as distinguished

from right. An onerous assignee takes the right of the cedent as it stands on the face of his title; subject, however (and this is the only exception), to counter claims on the part of the debtor, whose rights, of course, are not to be frustrated by the act of his creditor.

nee.(y) Purchasers from trustees, therefore, stand in a better position than creditors using diligence, who can only take the personal right which is the subject of the diligence as it stands in the person of the debtor.(z) This is equivalent to saying, in the case of a trust, that the estate cannot be operated upon by diligence at the instance of personal creditors of the trustee, except where the estate is vested in his person by infeftment upon an *ex facie* absolute title.(a)

SECTION II.

TESTAMENTARY DISPOSITION OF BENEFICIAL INTERESTS.

1630. Beneficial interests in personal estate are transmissible by will; in heritable estate by *mortis causa* disposition. Under the expression *personal estate*, we mean to include all rights which are moveable as to succession, including interests in land directed to be sold for the purpose of distribution. Conversely, it is to be understood that heritable interests as to succession in moveable estate—e.g., personal bonds to heirs secluding executors, and money given to trustees upon trust to purchase land—can only be transferred by the dispositive form of conveyance.(b) There may be some room for doubt as to the last-mentioned proposition, but the conveyancer would not be justified in assuming that money directed to be invested in land would pass by a will not containing dispositive words.(c)

Distinction as to transmission of beneficial interests in real and personal estate.

1631. A general settlement, disposing of all the granter's means and estate, carries a subsequently acquired interest in a trust-estate. A universal legacy carries equitable interests in moveable estate, whether vested in the testator at the date of the testament, or subsequently acquired.(d) The decisions have gone considerably further;

Beneficial interests are carried by a general disposition.

(y) *Somerville v. Redfearn*, 1 June 1818, 5 Pat. 707; and Professor Bell's Observations, 1 Com. 5th ed. 285. See also *Burns v. Lawrie*, 7 July 1840, 2 D. 1348; *M'Clelland v. Bank of Scotland*, 27 Feb. 1857, 19 D. 574.

of course, not affected by any unauthorised act on the part of the trustee; *Berford v. Brown*, 1 June 1832, 10 Sh. 609.

(z) *Gordon v. Cheyne*, 5 Feb. 1824, 2 Sh. 675, N. E. 566, and F.C.; *Dingwall v. M'Combie*, 6 June 1822, 1 Sh. 463, N. E. 481.

(c) We assume, of course, that the direction is of a nature to operate a conversion of the estate as to succession in the event of the beneficiary dying intestate. The general opinion is, that the heir can only be deprived of his right of inheritance, whatever the subject of inheritance may be, by a dispositive conveyance. A mere direction to invest trust-funds upon heritable security does not operate a conversion of the estate. See chapter 11 (Constructive Conversion).

(a) As to competitions between assignees and creditors, see *M'Gregor & Fraser v. Macandrew*, 15 June 1831, 9 Sh. 742; *Bell v. Willison*, 18 Jan. 1831, 9 Sh. 266; *Duke of Athole v. Anderson*, 24 Nov. 1831, 10 Sh. 49; *Bridges v. Ewing*, 15 Nov. 1836, 15 Sh. 8.

(d) *Baine v. Craig*, 8 June 1845, 7 D. 845; *Ramsay v. Lady White*, 26 June 1832,

(b) The character of the succession is,

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for it has been decided, and must now be taken as law, that a general testamentary settlement, executed before the acquisition of a power of disposal, is to be regarded as an exercise of the power of disposal in favour of the beneficiaries of the settlement.(e)

Contingent interests may be disposed of by will.

Capacity to test.

1632. A beneficiary under a contingent destination may dispose of his contingent interest in the succession by will. If the fee ultimately vests in him, the bequest will be effectual; if it is carried over by survivance to a substituted heir or joint legatee, the will is of course ineffectual as regards that interest. As to the capacity to test, there does not seem to be any distinction between beneficial and legal estates. It is understood that a married woman may dispose *intuitu mortis* of her interest in heritable estate vested in trustees for her use, even where the right of administration is not excluded. A minor may dispose of his beneficial interest in moveable estate, since he has the *testamenti factio* in relation to moveables. But he cannot dispose of a beneficial interest in heritable estate to the prejudice of the heir any more than he could dispose of the estate itself. In practice, it is common for testators to prevent their minor children testing on their interests in the succession by giving the estate over to the survivors or to other persons in the event of any of the children dying in minority.

SECTION III.

DESCENT OF THE BENEFICIAL INTEREST TO HEIRS OR EXECUTORS.

Rules of succession applicable in general to equitable interests.

1633. Beneficial interests descend to the legal representatives of the beneficiary in the event of his dying intestate—heritable interests accruing to the heir; moveable interests to the personal representatives, according to the threefold division recognised in the law of Scotland.(f) There can be no terce or courtesy of a beneficial interest, as those rights only attach to property in which the deceased died infeft.

Character of the succession affected by intention.

1634. The character of the succession to a trust-estate does not always depend, as in the case of property of which the deceased has

11 Sh. 786; *Fyffe v. Fyffe*, 13 July 1841, 3 D. 1205.

(e) See chapter 60 (Powers of Disposal), where the effect of the exercise of powers of disposal by will is examined. It may be added that, where the donee of the power predeceases the granter, no right vests in him, and his testament is therefore ineffectual as an exercise of the power; *Henry v.*

Grant, 19 Feb. 1824, 2 Sh. 605. The same result will follow from the revocation of a power of disposal; *Currie v. Currie*, 22 Jan. 1835, 13 Sh. 290.

(f) See, for example, *Graham v. Graham*, 31 May 1834, 12 Sh. 664, where a succession to an equitable interest under a trust-estate was divided into legitim, *jus relictæ*, and dead's-part.

the title as well as the interest, upon the nature of the estate, but more frequently upon the quality in which the truster intended it should be taken at the period of distribution. Where there is no direction to convert, the character of the succession will of course follow that of the property. The subject of constructive conversion is elsewhere discussed.

A beneficial interest in heritage falls to the heir of conquest where the deceased beneficiary would not have succeeded to it as heir of the settlor; conquest being what has come into the person of the deceased by purchase, gift, or other singular title, from a stranger, or from one to whom he would not by law have succeeded. (g)

In what cases equitable interests in heritage are held to be conquest.

1635. The right to the heritable and moveable succession vests in the beneficiaries named or conditionally instituted in the trust-settlement, without service or confirmation. (h) As regards moveable succession, the right of inheritance will again transmit to representatives, although the next of kin of the parties originally instituted should have died without confirming. (i) The rule is different in the case of heritable succession. The conveyance contained in the trust-deed is sufficient to give a vested interest in the estate to the parties named or designated in it, who succeed accordingly, not as heirs, but as donees of the equitable interest. But service is requisite to give a vested interest to parties claiming the estate as heirs of a deceased beneficiary. The heir of a beneficiary is not entitled to a conveyance until he has served; and should he die without serving heir, his right does not transmit to his own heir or disponee, it lapses altogether, and the succession devolves to the next heir of the beneficiary or person last seized. This doctrine was finally settled by the decision of the House of Lords in the case of *Buchanan v. Angus*. (k) As to the general proposition, that heritable succession does not vest without service, there could be no doubt; but it was thought by some that succession under a trust-deed formed an exception to the general rule, though upon what ground we are not aware. The doubt, however, is now removed.

Right of conditional institute vests without service or confirmation. Beneficial interests transmit to personal representatives without confirmation. Beneficial interests in heritage descend to the beneficiary's heir by operation of law, but do not vest without service.

1636. The case of *Buchanan v. Angus* (l) decides the point that

(g) Bell's Com. 6th ed. 1028; *supra*, chap. 4, sect. 2.

(h) *Gordon's Tr. v. Harper*, 4 Dec. 1821, F.C.; also 1 Sh. 185, N.E. 175; *Broughton v. Fraser*, 3 Mar. 1882, 10 Sh. 418.

(i) This result follows from the operation of the Act 4 Geo. IV. cap. 98, which vests the succession in personal representatives without confirmation. According to the older law, confirmation was necessary to

vest the right of succession in moveable property, as service still is, to vest the succession to heritable property.

(k) *Buchanan v. Angus*, 15 May 1862, 4 Macq. 374, 377. The doctrine was assumed both in the judgment of the Court of Session and on appeal. See also Lord Curriehill's opinion in *Beattie's Trs. v. Cooper's Trs.*, 14 Feb. 1862, 24 D. 580.

(l) 4 Macq. 377.

Whether a beneficial interest vests in a substitute-heir without service.

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service is necessary to vest an equitable interest in a *substitute* under a trust-deed. The destination was "to my brother, Major Smith, residing in Edinburgh, and the said Mrs Margaret Smith or Heugh, my sister, equally betwixt them, share and share alike, and their *heirs and assignees* whomsoever." The truster was survived by his brother and sister, and a right to one-half of the estate consequently vested in each of these persons. On the death of Major Smith, his sister was entitled to be served heir to him, as heir-at-law and also as heir-substitute under the substitution to heirs and assignees. She did not serve heir, and died without having obtained a conveyance of the estate from the trustees, leaving a trust-disposition and settlement of all her heritable and moveable estate. The House of Lords held that her brother's share of the succession never vested in her, and that his succession, after her death, devolved upon the next heir-at-law; thereby affirming the principle that service is necessary to vest the right of succession in an heir-substitute of provision under a trust-settlement.

SECTION IV.

DILIGENCE AGAINST THE TRUST-ESTATE.

Diligence may be used for attaching (1) the legal, or (2) the equitable or beneficial estate.

Creditors of the truster or trustee may attach the legal estate by diligence.

1637. A trust-estate is liable to be attached by diligence at the instance of creditors of the truster, and creditors of the trustee, and by the beneficiaries, or creditors claiming through them. The nature of the diligence which may competently be used in any of these cases, necessarily involves the question of the nature of the right which is sought to be attached, or rather, of the nature of the debtor's title to it. The trustee's title to the legal estate is commensurate with that of the truster; therefore creditors of the truster and creditors of the trustee attach the legal estate directly as it stands in the person of the latter, using the diligence adapted to secure the property of which the trust-estate consists. For example, they would use arrestment in the hands of the trustee for the purpose of attaching moveable rights only.^(m) Corporeal moveables would be secured by poinding; heritable estate vested in the person of the trustee, by adjudication.⁽ⁿ⁾ The nature of the beneficial interest in the estate is, in this case, immaterial.

Creditors of the beneficiary can only attach the equitable estate.

1638. But the creditors of a beneficiary have no right to attach

(m) *Kyle's Trs. v. White*, 14 Nov. 1827, 6 Sh. 40; but arrestment in the hands of debtors is incompetent, unless the executor, has been confirmed; *Henderson's Trs. v. Drummond's Trs.*, 20 May 1881, 9 Sh. 618.

(n) *E. of Breadalbane v. Macdonald*, 16 Jan. 1824. 2 Sh. 621, N. E. 529; *Ker v. Graham's Trs.* 21 Dec. 1827, 6 Sh. 270. As to inhibition, see *Hutchison v. Middleton, etc.*, 11 March 1880, 8 Sh. 709.

the trust-estate itself, except in so far as it is specifically destined to their debtor. Their doing so would be a manifest infringement of the rights of other beneficiaries, for the estate might not be sufficient to satisfy the claim of the individual beneficiary in full; and if adjudications were led against the estate by the creditors of one or more of the beneficiaries, the trustee would be prevented from realising the estate for the benefit of other parties having equitable interests in it. Inhibition, which would paralyse the execution of the trust, is, if possible, even a more unwarrantable use of diligence on the part of creditors of a beneficiary; and the Court have invariably recalled inhibition at the instance of such parties, for the obvious reason, that the act of a beneficiary in contracting debt, ought not to have the effect of preventing the trustee from exercising the powers of sale reposed in him by the truster for the benefit of all who are interested in his succession. Arrestment is the proper diligence for attaching a moveable interest in a trust-estate, whether that estate consist of heritable or of moveable property.(o) It is usual to serve schedules of arrestment on all the trustees; and this form, whether necessary or not, ought to be observed as the most effectual means of interpellating the trustees from paying to the beneficiary.(p) Arrestment of a beneficial interest may be used in the hands of the trustee for the purpose of founding jurisdiction; and arrestment by a beneficiary in the hands of a debtor to the trustee, has been held to be a competent mode of founding jurisdiction in an action of denuding.(q) After the death of a beneficiary, his interest may be attached by confirmation as executor-creditor.(r) A right to a share of heritage not given subject to a direction to sell, is not subject to arrestment; adjudication seems to be the proper form of diligence.(s) Where the beneficiary's right required to be made effectual by adjudication in implement, a creditor was held to be entitled to resort to the same form of action.(t)

Moveable interests are attachable by arrestment.

By what diligence a beneficiary may operate upon the legal estate.

1639. A beneficiary, although in one sense a creditor of the

(o) *Douglas v. Mason*, 1796, M. 16,213; *Wilson v. Smart*, 31 May 1809, F.C.; *Kennedy v. Crawford*, 20 July 1841, 3 D. 1266; *Learmont v. Shearer*, *infra*.

(p) See *Black v. Scott*, 22 Jan. 1830, 8 Sh. 367. If there is a factor to the trust, it is sufficient to arrest in his hands, without service on the trustees; *Dunlop v. Weir*, 29 Jan. 1823; 2 Sh. 167, N. E. 150.

(q) *Rigby v. Fletcher*, 18 Jan. 1838, 11 Sh. 256; and see cases in Chap. 76 (Actions). It seems doubtful whether a contingent interest in personal estate is arrest-

able; since it may be regarded as involving *tractum futuri temporis*. See *Pindar v. Davidson*, 27 May 1824, 3 Sh. 69. In *Wilson v. Gloag*, 27 June 1849, 2 D. 1238, an arrestment of the trustee's *private* property, on the dependence of an action against him in his character as trustee, was recalled.

(r) *Maxwell v. Wylie*, 25 May 1837, 15 Sh. 1005.

(s) *Learmont v. Shearer*, 8 March 1866, 4 Macph. 540.

(t) *Watson v. Wilson (Alexander's Tr.)*, 24 Jan. 1868.

1639. A trustee does not stand in precisely the same position with respect to the use of diligence as a creditor toward a debtor. The creditor in the latter case is not bound by the limitations of the trust. His claim lies against the trust-estate as assets of the trust, or against the estate as a fund which was implicitly pledged in security of obligations undertaken by the trustee. For this reason, he can only proceed by diligence against the estate in its natural character. A beneficiary, on the other hand, can claim no higher right in the trust-estate than the trustee has given him. If his right, for example, is of the nature of a claim to the proceeds of heritable estate, instead of being able to sue as against principle that he should be permitted to attach the estate by adjudication. Accordingly, in various cases where this has been attempted, the diligence has been held to be irregular. On the other hand, it is not very easy to see to what other form of diligence the beneficiary can have recourse. He cannot arrest; for the property out of which his share is payable, is in the hands of the trustee himself.(u) It has been held that he may have recourse to interdict, if there are reasonable grounds for apprehending that the beneficial estate is endangered by the threatened execution of a power of sale.(x) But if the complaint is, that the trustee refuses to exercise the power, there seems to be no way of getting at the estate except by an application to have it put under judicial management.(y)

Beneficiary may attach moveable funds by arrestment.

1640. As to moveable funds vested in trustees, these may undoubtedly be attached by using arrestment in the hands of the creditors of the trust; but the Court will not encourage the use of such arrestments, the effect of which is to prevent the funds coming into the hands of the trustee. Arrestment may, however, be used to found jurisdiction against trustees resident abroad, to compel them to account to the beneficiary for their intromissions in the Court of Session.(z)

Trustee's reversionary interest may be attached by judgment.

1641. It has been seen that a reversionary interest always remains in the person of the trustor and his heirs, unless the entire estate has been irrevocably disposed of. Where there is such an interest remaining, it may be attached, if heritable, by adjudication against the trustor himself, or his *hereditas jacens*;(a) if moveable,

(u) See *Hay v. Morrison*, 7 July 1888, 16 Sh. 1278.

(z) See as to the use of preventive process for the protection of the beneficiary's rights, Chapter 76 (Actions), § 2458 *et seq.*

(y) Inhibition appears to be incompetent; *E. of Lauderdale v. E. of Fife*, 9 March 1880, 8 Sh. 675.

(s) *Mags. of Dundee v. Taylor*, 20 March

1868, 1 Macph. 701; *Innerarity v. Gilmore*, 7 March 1840, 2 D. 818.

(a) *Barbour v. M'Minn*, 7 July 1826, 4 Sh. 806, N.E. 818; *Renton v. Girvan*, 30 Dec. 1888, 12 Sh. 266. Arrestment is also competent to attach the reversionary right to the surplus of the price, after a sale of the estate; *Cameron v. Macewan*, 4 Feb. 1880, 8 Sh. 440.

by arrestment or confirmation as executor-creditor of the truster. (b) Creditors of a deceased beneficiary may attach his interest in a lapsed succession by declaratory adjudication, or by confirmation as executors-creditors under the Statute, as the nature of the case may require. (c)

(b) See § 1638, *supra*.

(c) Chapter 58 (Confirmation). On the subject of diligence against the moveable estate at the instance of the truster's cre-

ditors; see also Chapter 71 (Passive Representation); cases in Mor. Dic. *voc* "Creditors of a Defunct;" and in Shaw's Dig. *voc* "Heritable or Moveable," sect. 2.

CHAPTER LI.

COMPLETION OF THE BENEFICIARY'S TITLE TO
THE ESTATE.

In what cases
the beneficiary
is entitled to
demand a spe-
cific convey-
ance.

1642. We are now to treat of the mode of enforcing the beneficiary's right to specific conveyance, where the estate is secured to him either by the terms of a deed of trust, or by investment under its provisions. It is to be observed that, even when the beneficiary's right is secured upon the trust-estate, he is not necessarily entitled to a specific conveyance. For example, where trust-funds are secured during the continuance of the trust by investment on heritable security, subject to the purposes of the trust, if those purposes are for conversion and division into shares, the claim of the beneficiary will resolve into a mere right of action against the trustees for payment of his proportion of the proceeds of the investments. In such cases, however, it is thought that after the death of the trustees the beneficiaries would be entitled to take up the estate, and to carry out the trust purposes for themselves.

Beneficiary
cannot insist on
a conveyance to
the injury of
the interests of
other benefi-
ciaries.

But a gift of a
fee-simple inter-
est entitles the
beneficiary to
demand the
specific estate.

1643. Where a truster directs a limited interest to be given to one party, leaving the reversionary or other partial interest to another, such direction must be literally fulfilled. So also, if a truster directs a conveyance of the estate to a plurality of persons, the duty of the trustee is, not to divide the estate, but to execute a *pro indiviso* conveyance to the beneficiaries for their respective interests. (a) Where, on the other hand, a truster directs his trustees to convey certain estate to a beneficiary unconditionally, the Court will not allow the right of the latter to be cut down to a superiority, (b) *lifere*, (c) or other limited interest, upon indications of intention deduced from other parts of the will or trust-deed. Trus-

(a) *Watson v. Craocour*, 21 Nov. 1856, 19 D. 70.

(b) *Anderson v. Bank of Scotland*, 7 June 1842, 4 D. 1874.

(c) See Chapter 87 (Conditional Institution in Moveable and Mixed Succession).

tees are bound to convey, and the beneficiary is entitled to adjudge the estate in terms of the direction, leaving to other claimants to make good their claims in an action against the beneficiary.

1644. If a beneficial estate is burdened with payment of an annuity, it is a question of construction upon the terms of the trust-deed, whether the annuity is to be secured upon the trust-estate, or to remain on the footing of a personal obligation affecting the beneficiary. In the case of *Stainton v. Stainton's Trs.*,^(d) it was held that a widow was entitled to have her provisions declared a burden upon the heritable estate in a conveyance which the trustees were directed to execute in favour of the heir; while in the case of *Kerr v. James*,^(e) it was held that the intention was simply to impose a personal obligation upon the residuary legatee in favour of the annuitant, and the trustees were accordingly ordained to make over the fund without requiring security for the payment of the annuity. The necessity of exact conformity to the will in all that relates to the ultimate disposal of the estate, is further illustrated by the case of *Stewart's Trs. v. Stewart*.^(f) In this case a testator having directed a conveyance of the fee of his estate to his children, with a destination to the survivors in the event of any of the children dying without issue, but limiting his daughters' interests to a life-rent, it was held incompetent to insert in the destination to the daughters a power of disposing of their shares in the event of their dying without issue.

When annuitants are entitled to have their interests secured on the estate.

1645. There is nothing peculiar in the form of the diligence by which a beneficiary may complete his title to the specific estate during the lifetime of the trustee. Where the trustee refuses to convey in terms of the trust, the heritable estate may be attached by declarator of trust, with conclusions for adjudication in implement.^(g) Moveable estate may be attached by ordinary diligence pursuant to a decree of denuding. In either case, the action is directed against the trustee, and the effect of the diligence is to transfer the estate from the person of the trustee to that of the beneficiary.^(h) According to the decision pronounced in the leading case of *Gordon's Trs. v. Harper*,⁽ⁱ⁾ a beneficiary, whether instituted directly or conditionally, is not required to complete a title to the estate by service or confirmation, in order to put himself in

How the beneficiary may enforce his right to a specific conveyance against the trustee.

^(d) *Stainton v. Stainton's Trs.*, 25 Jan. 1850, 12 D. 572.

^(g) *Waddell v. Rymer*, 9 July 1883, 11 Sh. 949.

^(e) *Kerr v. James*, 12 Feb. 1858, 20 D. 563.

^(h) Chapter 50, section 4.

^(f) *Stewart's Trs. v. Stewart*, 20 Dec. 1851, 14 D. 298.

⁽ⁱ⁾ *Gordon's Trs. v. Harper*, 4 Dec. 1821, F.C.; 1 Sh. 185, N.E. 175.

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titulo to pursue an action of denuding. His title is the conveyance in his favour contained in the trust-deed. (*k*)

Completion of title to the equitable estate under a lapsed trust.
Heritable estate. Declaratory adjudication.

1646. The completion of a beneficial title to trust property, the legal title to which has lapsed by the death or non-acceptance of the trustees, requires a more careful consideration. In the case of heritable property, the title of the beneficiary is most usually made up by declaratory adjudication, a form of action which was suggested by the Court in disposing of the case of *Drummond v. Mackenzie*, (*l*) in 1758, and which in practice has been extended to all cases of lapsed trusts, whether the failure has resulted from non-acceptance, death, supercession of the trust, or any other cause.

Completion of title by declaratory adjudication to a moveable interest in heritable property.

1647. In a more recent case, (*m*) the question was very anxiously considered, whether a moveable interest in heritable property, falling by the legal course of succession to the next of kin of a beneficiary, could be taken up by declaratory adjudication. The question arose in this way: The curator of an insane person had invested his ward's funds upon heritable security. The succession therefore remained moveable, although the subject to which the title was to be made up was heritable. The question arose in the shape of an objection taken by a purchaser to the beneficiary's title, which had been completed by declaratory adjudication in the circumstances here stated. As that objection was raised in an action originating in the Sheriff-court, a majority of the judges of the First Division, before whom the case came on advocacy, held that the decree of declaratory adjudication, being the decree of a superior Court, could not be challenged in the Sheriff-court; a view of the case which relieved them from the necessity of deciding this interesting question of conveyancing on its merits.

Lord Curriehill's opinion in *Marquis of Ailsa's* case examined.

1648. Lord Curriehill, who dissented from the judgment, explained in an elaborate opinion (*n*) his reasons for holding the title to be inept, and which were in substance, that the right to be adjudged was not a trust, inasmuch as the title to the security stood in the name of the person under curatory, and might have been adjudged as in *hæreditate jacente* of the defunct by a *simple action of adjudication*. It appears to us, however, that in the case under consideration, an adjudication without declaratory conclusions would have been open to the objection of want of title. At common law the succession to the bond would have devolved upon the heir. The

(*k*) As to the completion of titles by substitutes and conditional institutes, see chapter 86; also 50, section 8.

(*l*) *Drummond v. Mackenzie*, 1758, M. 16,206; *Dalziel v. Dalziel*, 1756, M. 16,204,

"Trust," App. No. 1; and see *Black v. Lorimer*, 25 June 1821, 1 Sh. 521, N. E. 481.

(*m*) *Marquis of Ailsa v. Jeffray*, 15 Feb. 1859, 21 D. 492.

(*n*) 21 D. 500.

right of the next of kin arose, not upon any liquid obligation susceptible of being enforced by adjudication in implement, but upon the maxim of equity, that the act of the curator, in converting the fund from moveable into heritable estate, should not prejudice the right of succession of the next of kin; and it was necessary that this right should be declared, as a step towards the ultimate conclusion for adjudication. It was justly observed by Lord Deas,^(o) that the process of declaratory adjudication rested upon the sanction given to that form of proceeding by the Court, in virtue of their prætorian power of adapting the forms of process to the requirements of a *casus improvisus*. We may add, that although the right which was the subject of declarator in the cases of *Drummond* and *Dalziel* was different in its inception from that in the *Marquis of Ailsa's* case, yet, as the cases have this element in common, that the pursuer's interest resulted from his legal relation to the party last seised,—his right to have that relation ascertained by ancillary conclusions of declarator could not be controverted, without disputing the principle upon which that form of action was sanctioned in the cases of *Drummond* and *Dalziel*.

1649. The case of *Crawford v. Earl of Dundonald*,^(p) appears to be an authority directly in point. Certain persons in the character of next of kin claimed the succession to a moveable debt, which had been rendered heritable by decree of adjudication, and brought an action of declaratory adjudication for the purpose of completing their title to it. The Court, on a view of the circumstances under which the debt had been rendered heritable, decided that the right belonged to the heir-at-law, but were of opinion that the action was correct in point of form, supposing that any interest had vested in the pursuers. It had previously been determined in *Gordon's Trs. v. Harper*, that the assignee of a beneficiary might complete his title by a declarator with conclusions for adjudication.^(q)

Crawford v. Earl of Dundonald.

1650. Notwithstanding the decisions which have been given on the question, doubts are still entertained in the profession as to the proper mode of completing a title in the person of a fiar, to property in which a liferenter has been infeft for his liferent use allenary, and for his children *nascituri* in fee. Mr Parker, in noticing the class of titles to which the process of declaratory adjudication is applicable, has the following remark:—"Where a fiduciary fiar holds the

Completion of fiar's title under destination to children *nascituri*;

by declaratory adjudication;

^(o) 21 D. 508.

^(q) *Gordon's Trs. v. Harper*, 4 Dec. 1821,

^(p) *Crawford v. E. of Dundonald*, 22 1 Sh. 185, N. E. 175.

May 1838, 16 Sh. 1017. See 1 Bell's Com.

5th ed. pp. 35, 751.

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by service as
heir of provi-
sion.

right for behoof of A. and others, it becomes necessary to have it declared who those others are, coupled with adjudication.”(r) On the other hand, it was expressly decided, in the case of *Dundas*,(s) that the fiar might make up a title to the estate by service as heir of provision to the liferenter or fiduciary fiar, even where the latter was infeft in the liferent only; and, *a fortiori*, this mode of completion would seem to be competent where, as in the case of *Barstow*,(t) infeftment is taken by the liferenter for himself and on behalf of the children of the marriage; or where, under the modern mode of infeftment by registration, the character of the infeftment rests upon the terms of the destination in the registered deed of conveyance. It appears to us that an infeftment in favour of the liferenter *and* of the children *nascituri*, is equivalent in all respects to an infeftment in favour of the liferenter for behoof of himself and his children. The latter appears to be the more correct form, since, strictly speaking, sasine, or real and corporal possession, cannot be given to children *nascituri*. In this case, also, service seems to be an appropriate mode of completing the title. We think, however, that the method of procedure by declaratory adjudication is also competent, the liferenter being regarded as a trustee of the fiduciary fee, and his death as a lapse of the trust. In practice, the title to fiduciary fees is most frequently completed in the last mentioned method; and in many cases, where the beneficial interest is much divided, adjudication is cheaper and more convenient than the completion of separate titles by service in favour of the respective beneficiaries.

Completion of
title to per-
sonalty under
lapsed trust, by
confirmation;

1651. The title to a lapsed trust of personal estate, where the beneficial interest is in the next of kin of the truster, may be made up by confirmation in that character.(u) Where the beneficiaries are not of the next of kin, it has been suggested that they might make up a title by confirmation as executors-creditors of the trustee, supposing the lapse to have arisen in consequence of his death after acceptance; but unless we assume that a trust is an *inheritable right* (which it clearly is not), this course would seem to be incompetent, since confirmation can only be used to take up an inheritance. In the case of a lapse by non-acceptance on the part of the trustees, the beneficiaries may confirm to the truster in the

(r) Notes on Adjudication, p. 86, No. 8.

(s) *Dundas v. Dundas*, 28 Jan. 1823, 2 Sh. 145, N.E. 138. In *Andrews v. Laurie*, 12 Dec. 1849, 12 D. 344, it was held that service was a habile mode of completing a title to a right constituted by reserved real burden.

(t) *Barstow v. Stewart*, 18 Feb. 1858, 20 D. 612. See 1 Fraser, 815, and cases there cited.

(u) *Gavin v. Kirkpatrick*, 30 May 1826, 4 Sh. 629, N. E. 637.

character of legatees. In the case of a lapse by the death of the trustee before he has realised the estate, the beneficiary's title may be completed by confirmation to the truster *ad omissa vel non executam*.(x) But where the trustee dies after realising, but before distributing the estate, the estate can only be taken up by a judicial factor acting under the authority of a warrant of the Court of Session. In *Gavin v. Kirkpatrick*,(y) it was decided that the right of beneficiaries, who had confirmed the right to a lapsed succession *qua* next of kin, might be attached by adjudication at the instance of creditors. We incline to think that, even in the case of a purely moveable, and *a fortiori* in the case of a mixed heritable and moveable succession, adjudication, as a catholic diligence, might be resorted to with propriety for the purpose of vesting the *universitas* of a succession in the beneficiaries. by adjudication.

1652. In the preceding observations it is assumed that the trust is in a situation to admit of an immediate distribution, or conveyance of the estate. Where there are contingent interests to be protected, or discretionary powers to be exercised, the proper course in such cases is to have a judicial factor appointed to execute the trust, who may confirm under the Act of Sederunt of 1730, and complete a title to the heritable estate under the Titles to Land Acts.(z) Completion of titles by judicial factors on trust-estates.

1653. By the 14th section of the Trusts (Scotland) Act 1867,(a) it is enacted that, "When any person shall be entitled to the possession for his own absolute use of any heritable property or moveable or personal property, the title to which has been taken in the name of any trustee, or *curator bonis*, or factor *loco absentis*, or factor *loco tutoris*, or judicial factor, or other person who has died or become incapable of acting without having executed a conveyance of such property, it shall be lawful for the person beneficially entitled to such property to apply by petition to the Court for authority to complete a title to such property in his own name, and such petition shall specify and describe the heritable property, and refer to an inventory in which the moveable or personal property is specified, to which such title is to be completed, and after such intimation and inquiry as may be thought necessary, it shall be lawful for the Court to grant a warrant for completing such title as aforesaid, which warrant shall specify and describe the heritable property to which it is applicable, and shall also specify the moveable Completion of title under the Trusts Act by the beneficiary;

(x) See *Nicol & Carny v. Wilson*, 10 June 1856, 18 D. 1000.

(y) *Gavin v. Kirkpatrick*, *supra*.

(z) 23 & 24 Vict., cap. 148, § 38, amending 21 & 22 Vict., cap. 76, § 21; and see 30 & 31 Vict., cap. 97, § 15.

(a) 30 and 31 Vict., cap. 97.

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or personal property, or shall bear reference to an inventory appended to the petition in which such personal property is specified; and such warrant shall be effectual as a conveyance of such heritable property in favour of the petitioner in like manner and to the same effect as a warrant in favour of a judicial factor, granted under the authority of the thirty-eighth section of 'The Titles to Land (Scotland) Act 1860,' and shall also be effectual as an assignation of such moveable or personal property in favour of the petitioner."

by factors.

1654. By section 15 it is provided that in petitions for the appointment of judicial factors authority to complete titles may be prayed for, and that the application may include moveable or personal property.

Completion of title by conveyance from the heir of the last surviving trustee.

1655. In the case of a trust lapsing by the death of the trustees, if the trust-conveyance includes a destination over to the heir of the last surviving trustee, a title to the beneficial estate may be made up by conveyance from the trustee's heir, if he is willing to serve. (b) In the Commissary Court of Edinburgh, the heir of line is held to be the only party entitled to serve in virtue of a destination to the heirs of a surviving trustee; and this irrespective of the consideration whether the trust-estate consists of heritable or moveable property. A general service vests in the heir a title to the moveable estate to which the trustees have confirmed, though the heir may with propriety confirm as executor *ad omissa vel non executata*. In a case where the heir of a last surviving trustee had made up a title, but died during the dependence of the suit, it was held that the beneficiaries were entitled to sist the next heir, he having previously served heir of provision to the truster. (c) The radical or reversionary interest of the truster under a trust-conveyance *inter vivos* stands on his own title. His heir may, therefore, complete a title to it directly by serving heir to his ancestor. (d)

Completion of title to truster's radical or reversionary interest.

1556. As a trust is only a personal interest, it may be extinguished by discharge, the effect of which is simply to put an end to the particular right, leaving the estate subject to the more general destination of the trust-settlement, in so far as that may be applicable. Thus, if one of two beneficiaries having a joint interest in an estate renounce his interest, it will devolve *jure accrescendi* upon his co-beneficiary. (e) The discharge of a liferent interest has the effect of disburdening the equitable estate; and therefore, if the fiar have previously acquired a vested interest, he will then be *in*

(b) Chap. 57 (Completion of Trustee's Title).

(c) *Blackwood v. Brewster*, per Lord Ardmillan, 25 June 1862 (not reported).

(d) Chap. 45 (Radical Right).

(e) *Gillespie v. Robertson*, 11 Mar. 1824, 2 Sh. 795, N.E. 656.

titulo to demand a conveyance in fee-simple. (f) Where, on the other hand, the beneficial interest in a subject is held by two persons in severalty, and one of them discharges his right, the benefit of the lapse will accrue to the general estate. (g) CHAPTER LI.

(f) *Pretty v. Newbigging*, 2 Mar. 1854, 16 D. 667; *Annandale v. M'Niven*, 9 June 1847, 9 D. 1201; *Ker v. Wauchope*, 5 May 1819, 1 Bligh, 1. See chapter 69 (Anticipation of Payment).

(g) *Breadalbane Trs. v. Pringle*, 15 Jan. 1841, 3 D. 857; see the principle stated by Lord Medwyn, pp. 868-4.

PART VII.

ESTATES OF TRUSTEES AND EXECUTORS.

CHAPTER LII.

OF THE OFFICE OF AN EXECUTOR.

Limits of the subject, and method of exposition.

1657. In treating of the administration of estates of succession, the first subject for consideration is that of the title of the party by whom the succession falls to be administered. The only legal title to the administration of the personal estate is that of an executor, under one or other of the denominations pertaining to that office. (a) Executors are of two classes; *first*, those appointed by the deceased himself, who are called executors-nominate; *secondly*, in default of an express appointment of executors by the deceased, or on the failure of such appointment by the death or non-acceptance of the persons appointed, their place is supplied by an executor or executors appointed by a commissary, and styled executors-dative, of whom there are several classes. These we shall consider in their order, with reference to the manner of the appointment, and the extent and quality of the estate which is subjected to their administration. The powers and duties pertaining to the function of the administration of personal estate, and the subject of the liabilities incurred by executors in respect of their acceptance of office, are reserved for consideration in the subsequent chapters.

How an appointment of executors may be made.

1658. I. EXECUTORS-NOMINATE.—The nomination of an executor is a usual but not an indispensable part of a testament or disposition

(a) Persons undertaking the administration of personal estate without legal authority incur the passive title of vitious intro-

mission, as to which see chapter 71, sect. 4 (Passive Representation).

of moveable estate. It may be made by any writing, holograph or tested; and the appointment may be revoked, and a new appointment of executors may be made at any time of the testator's life,(b) and an appointment of executors is good although unaccompanied with any provisions disposing of the succession. The word executor has no equivalent in the legal language of Scotland, and although in the common style of appointments the expression used is executor and universal intromitter, it does not appear that the latter term alone would suffice to support an appointment of executors-nominate.(c)

1659. By the ancient law of Scotland the appointment of an executor was equivalent to a universal legacy in favour of the person appointed, pecuniary legacies being regarded as burdens on the executor's residuary interest. But by the Statute 1617, cap. 14,(d) the office of executor was declared to be a trust for the benefit of the widow, children, and nearest of kin of the testator, according to the division prescribed by the common law, reserving to the executors a third of the dead's part, after deduction of debts and legacies. The right thus reserved to executors, to appropriate one-third of the undisposed-of succession, has been taken away by an act of the present reign.(e) According to the present law the appointment of an executor may be said to be equivalent to a conveyance in trust of the ancestor's entire moveable estate, wherever

Office of executor-nominate declared to be a trust by Statute.

(b) See Chapter 18, sect. 5, as to the Revocation of Testamentary Writings.

(c) As to the meaning and effect of "universal intromitter" see chapter 48, sect. 1 (Resulting Trusts). In the case of *Dundas v. Dundas*, 27 Jan. 1887, 15 Sh. 427, a gift to a nephew "with power to see this will executed," appears to have been considered a good appointment of the nephew to be executor-nominate.

(d) 1617, cap. 14. The Statute after a preamble declares: "Therefore his Majesty, with advice and consent of the Estates of Parliament, finds and declares that all executors already nominate in any testament not as yet confirmed, or to be nominate in any testament to be made hereafter, are, and shall be obliged to make count, reckoning, and payment of the whole goods and gear appertaining to the defunct, and intromitted with by them, to the wife, children, and nearest of kin, according to the division observed by the laws of this realm; reserving only to the saids executors the third of the defunct's part, all debts being first payed and deduced, without prejudice

alwayes to the saids executors of whatsoever legacies left to them by the saids defuncts, which shall no wayes be prejudged by this present Act; but the saids executors shall have full right to their saids legacies, albeit the same exceed the said third of the defunct's part; and in case the saids legacies exceed the whole third part, the saids executors shall have right to the whole legacie and no part of the third: With this expresse declaration, that where legacies are left to the executors, they shall not fall both the saids legacies and a third by this present Act, but the saids legacies shall be imputed and allowed to them in part of payment of their third."

(e) 18 Vict., cap. 23, § 8. "So much of an Act of the Parliament of Scotland passed in the year One thousand six hundred and seventeen, and entituled *Anent Executors*, as allows executors-nominate to retain to their own use a third of the dead's part in accounting for the moveable estate of the deceased, is hereby repealed, and executors-nominate shall, as such, have no right to any part of the said estate."

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situated (including not only the dead's part, but also the legitim and *jus relictæ*, where such are due), together with a grant of such powers of administration as belong to the office of executor at common law. (f) In this capacity the executor takes the estate for the benefit of the testator's legatees, if any; otherwise for the benefit of the widow, children, and next of kin as provided by the Statutes.

Office of executor-nominate vests in the acceptors and survivors.

1660. Executors-nominate hold a joint and several office, which vests at common law in the acceptors and survivors. (g) On failure of the appointment by non-acceptance, the estate may be taken up by the persons legally entitled to the office of executor-dative; or a judicial factor may be appointed by the Court of Session, on the application of any person interested in the succession. In the case of a failure subsequent to acceptance, as by the death of a sole executor, or of all the executors where there are more than one, the commissary will appoint executors-dative *quoad non executa*. (h) The omission to name executors in a trust-disposition of moveable estate is not attended with any practical inconvenience; for, as we shall immediately see, the testator's trustees are, in their character of universal disponees, entitled to the office of executors-dative *qua* universal disponees, in preference to the next of kin, or others claiming the office by a legal title.

Jurisdiction of the ancient Ecclesiastical Courts in relation to appointments of executors-dative.

1661. II. EXECUTORS-DATIVE.—Prior to the changes consequent on the reformation of religion, the administration of personal succession in Scotland pertained to the Ecclesiastical Courts, who claimed and successfully asserted a jurisdiction in everything relating to succession, *quod ad testamentorum et ultimarum voluntatum cognitionem pertinuit*. It is matter of history that the administration of the canon law by these Courts attained in Scotland a degree of authority never conceded to it in England; and though we are unable to point to the records of actual decisions in this class of cases, it may safely be assumed that the principles of the canon law, as embodied in the *corpus juris canonici*, formed the code of practice in relation to the administration of personal succession. Upon the abolition of Episcopacy, the jurisdiction of the Bishops' Courts was assumed by the Court of Session, but was afterwards vested by appointment of the Crown in Commissaries, whose commissions were subsequently confirmed by the Legislature. For further particulars regarding the constitution and history of these

(f) See this explained in the opinion of Lord Justice-Clerk Inglis, in *White v. Finlay*, 15 Nov. 1861, 24 D. 47.

(g) See chapter 54, section 2 (Office of Trustee and Executor).

(h) *Infra*, *hunc tit.*

courts, we refer to the introductory chapter of Mr Fraser's Treatise on the Personal and Domestic Relations.⁽ⁱ⁾ CHAPTER LII.

1662. The Commissary Court of Edinburgh was the principal consistorial judicature in Scotland. It exercised a twofold jurisdiction, the one local, the other general. Its local jurisdiction extended over its own proper commissariat, which comprehended the county of Midlothian and certain adjacent counties. The general jurisdiction of the Commissary Court of Edinburgh extended over the whole of Scotland; and under that jurisdiction it granted appointments of executors, and confirmed the testaments of Scotchmen dying abroad, or having no determinate local domicile in Scotland. The inferior Commissary Courts were twenty-three in number; they exercised jurisdiction in relation to the appointment and confirmation of executors to persons having, at the time of their death, their domicile or chief residence within their respective commissariots.^(k) Jurisdiction of the Commissary Courts. By the Statute 4 Geo. IV., cap. 97, the provincial commissaries were superseded, and their functions were devolved on the Sheriffs of the counties; and by two statutes of the last reign, the metropolitan court was also dissolved, its local jurisdiction was transferred to the Sheriffs of the respective counties, and the general jurisdiction of the Commissary Court of Edinburgh, in relation to the appointment and confirmation of executors, was vested in the Sheriff of Midlothian.^(l) The Act of the present reign regulating the mode of appointment of executors-dative leaves the jurisdiction of the Commissary Courts unchanged; but, as will afterwards be seen, it virtually confers jurisdiction on Her Majesty's Courts of Probate in England and Ireland in relation to personal succession partially situated in these countries, and in a corresponding degree extends the jurisdiction of the Commissary Courts of Scotland.

1663. The jurisdiction of the Commissary Courts, in relation to the appointment and confirmation of executors, is purely ministerial. It is the function of these Courts to decide in competitions for the office of executor;^(m) but they have no authority to determine questions relating either to the extent of the subjects falling within the succession, or to the validity of the instrument constituting the testament of the deceased. Accordingly, it has been ruled that a petition to the Commissary Court for delivery of moveable effects alleged to have belonged to the deceased is incompetent; and it was doubted whether the Commissary had power even to

Commissary Court decides who is entitled to the administration, but not extent of the succession or validity of will.

⁽ⁱ⁾ Fraser, vol. i, chapter 1; Ersk. 3, 9, 28.

^(l) 4 Geo. IV. cap. 97; 1 Will. IV., cap. 69; 6 & 7 Will. IV., cap. 41.

^(k) Ersk. 3, 9, 29, and cases in *M. voce* "Forum Competens," pp. 4846-4856.

^(m) Ersk. 3, 9, 32.

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grant a warrant to inventory and preserve the effects.(n) Questions of identification of the subjects of the succession fall to be determined, either by the Sheriff or the Court of Session, in an ordinary action at the instance of the executor, or in the form of a multiplepinding. The question, what are the testamentary writings of a deceased person, where it depends on construction, is most usually raised by way of an action of declarator or multiplepinding in the proper Court; or by action of reduction, where the validity or authenticity of the deed is in question.

Review of judgments of the Commissaries.

1664. In the administration of this branch of the Commissary's jurisdiction, an appeal lies from the Sheriff-substitute as Commissary-depute to the Sheriff as Commissary, under the Statute; (o) and the judgment of the Commissary, like that of all inferior judges, is subject to review by advocacy, suspension, and reduction. Questions of competition for the office of executor are usually disposed of upon the competing petitions; and in cases of review by the Court of Session, a record is made up as in an action of competition.

Grant of administration in England or Ireland equivalent to appointment of executors-dative.

1665. In England and Ireland the right of administration of personal property, failing executors-nominate, is granted either to the next of kin or to persons claiming a beneficial interest in the succession, by letters of administration issuing from the respective Courts of Probate of these countries. Where the deceased has left a will without nominating executors, letters of administration are granted with the will annexed. A grant of probate or letters of administration is necessary to clothe the administrator or executor with an active title; but the right of succession vests, as in Scotland, by mere survivance. (p)

Extension of jurisdiction by Statute in relation to confirmations, etc.

1666. In consequence of the substantial identity, in principle, of the laws of administration of personal succession which prevail

(n) *Milligan v. Milligan*, 17 Jan. 1827, 5 Sh. 206, N. E. 190.

(o) 4 Geo. IV., cap. 97, § 10.

(p) It is necessary to attend to the distinction between the functions of the Commissary in the appointment and confirmation of executors, and the more extensive authority exercised by the Courts of England and Ireland in granting probate and letters of administration. Where administration is granted by the last mentioned Courts to the effects of individuals dying intestate, the effect of the appointment appears to be substantially equivalent to that of the confirmation of an executors-dative in Scotland; but in the case of the probate of a will, or the grant of letters of administration with the will annexed, the

grant is equivalent to a decree affirmatory of the validity of the will (reserving all questions of construction), inasmuch, that the will cannot afterwards be challenged in a Court of law. Confirmation in Scotland has not, in the general case, any such effect; and is, moreover, liable to be set aside by reduction, at the suit of any party interested. It would, therefore, seem to follow, that the sealing of a confirmation by the Court of Probate in England,—which by 21 & 22 Vict., cap. 56, § 12, is declared to have the like force and effect in England as if a probate or letters of administration had been granted by the said Court,—is not to be taken as conclusive in a question as to the validity of the instrument.

in the different parts of the United Kingdom, it was considered by the Legislature to be unnecessary that the personal representatives of deceased persons should be subjected to the expense of taking out separate titles of administration in the different Courts of Great Britain and Ireland; and accordingly, by Statute 21 and 22 Vict., cap. 56, persons obtaining a title of administration in any part of the United Kingdom, may have that title extended to other parts of the kingdom by complying with certain formal requirements. But as these have relation to the confirmation as well as to the appointment of executors, their consideration is postponed to the next chapter.

1667. Prior to the passing of this enactment, the procedure for the appointment and confirmation of executors was commenced by an Edict, which was issued by the Commissary Court on the application of any person interested. The Edict was an intimation to all concerned that the Court, at the distance of nine days after the publication, would proceed in the confirmation of an executor to the deceased. It was published by being affixed to the church door of the parish of the deceased's residence; or, if he died abroad, at the parish church door of Saint Giles', Edinburgh, and at the market cross. Under 6 Geo. IV., cap. 120, § 51, citations in the case of persons dying domiciled abroad, are now given by registration of the citation in the Record of Edictal Citations. *(q)*

Appointment of executors-dative formerly made by edict.

1668. The form of procedure in applications for the appointment of executors-dative is now regulated by the above-mentioned statute. *(r)* Section 1 abolishes the old form of raising edicts of executry for the purpose of obtaining the raiser decerned executor; and by section 2 it is provided, that every person desirous of being decerned executor shall, instead of applying as heretofore for an edict of executry from the Commissary, present a petition to the Commissary for the appointment of an executor, which shall be subscribed by the petitioner, or by his agent; and which (sect. 3) shall be presented to the Commissary of the county wherein the deceased died domiciled, or if he died domiciled furth of Scotland, or without any fixed or known domicile, having personal or moveable property in Scotland, to the Commissary of Edinburgh. By section 4 every such petition shall be intimated by the Commissary Clerk affixing on the door of the Commissary Court-house, or in some conspicuous place of the Court, and of the office of the Commissary Clerk, in such manner as the Commissary may direct, a full copy of the petition; and by the Keeper of the Record of Edictal Citations at Edinburgh inserting in a book, to be kept by him for the purpose, the names and de-

Form of appointment of executors-dative under Confirmation and Probate Act. Procedure under petition in the Commissary Court.

(q) See 2 Bell's Com., 5th ed. p. 81.

(r) 21 and 22 Vict., cap. 56.

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signations of the petitioner and of the deceased, the place and date of his death, and the character in which the petitioner seeks to be decerned executor ; which particulars the Keeper of the Record of Edictal Citations shall cause to be printed and published weekly, along with the abstracts of the petitions for general and special services.

Decerniture and confirmation upon such petitions, etc.

1669. By section 6 it is provided, that "on the expiration of nine days after the Commissary Clerk shall have certified the intimation and publication of a petition for the appointment of an executor as aforesaid, the same may be called in Court, and an executor decerned, or other procedure may take place, according to the forms now in use in case of edicts of executry, and with the like force and effect, and decree-dative may be extracted on the expiration of three lawful days after it has been pronounced, but not sooner ; provided always that nothing herein contained shall alter or affect the law as to executors finding caution ; and that bonds of caution for executors may be partly printed and partly written." Section 7 provides, "That nothing hereinbefore contained shall alter or affect the course of procedure now in use before the Commissaries in confirmations of executors-nominate."

Preference given to executors-nominate and universal disponees and legatees in competitions for office of executor.

1670. In a competition for the office of executor, the Commissary gives the first place to the person named to it by the deceased himself, whose will, as Erskine observes,^(s) ought to be first regarded in the management and disposal of his estate after his death. Accordingly, in an advocacy of a competition for the office of executor between executors nominated in a trust-settlement and the truster's next of kin—who had brought a reduction of the deed—the Court adhered to the decision of the Commissaries, preferring the trustees. The Lord President Hope observed,—“An executor is a trustee accountable to those having right, and to the complainer if it shall be found that she has the right. Until the deed of nomination, therefore, be set aside, we cannot prefer any one to the executor-nominate.”^(t) Failing executors-nominate, universal disponees or legatees, who take under a general disposition or testament, are preferred in the first place to the office of executors-dative. In this class are comprehended trustees of personal succession. According to Erskine, a universal legatee, if he was not also appointed executor by the deceased, was not admitted to the office of executor, if either next of kin, widow, or creditor, appeared to oppose him ; but he is now preferred to all persons whatsoever except executors-nominate ; on the principle, that those to whom

^(s) Ersk. 8, 9, 82.

^(t) *Graham v. Bannerman*, 28 Feb. 1822.
1 Sh. 862, N. E. 889.

the deceased has given the control of, or substantial interest in, the succession, ought also to have the right of administering it, if he has not expressly excluded them.(u) A liferenter of the whole succession, with a power of disposal, is not a general donee, and is not entitled as such to the office of executor in competition with the next of kin, or legatees of the reversionary interest.(x)

1671. In the order of legal preference the next of kin, one or more, are next entitled to the office of executors-dative, all in the same degree being entitled to share in the appointment. We refer to a previous chapter(y) for a statement of the rules according to which proximity of kindred is computed in the law of Scotland, which, it will be observed, differs in this respect both from the civil and canon laws. The Moveable Succession Act,(z) in the section which gives to the representatives of certain predeceasing next of kin a right to the share of the succession which would have accrued by survivance to their ancestor, reserves to the next of kin a preferable right to the office of executor; it being provided "that the surviving next of kin of the intestate claiming the office of executor shall have exclusive right thereto in preference to the children or other descendants of any predeceasing next of kin, but that such children or descendants shall be entitled to confirmation when no next of kin shall compete for said office." On the death of the whole original next of kin of a defunct, his nearest surviving kindred are entitled to the office of executors *qua* next of kin; and it is no objection to their being decerned executors that they have no beneficial interest in the executry estate.(a) Where the intestate was domiciled at his death in a foreign country, the person or persons who by the law of that country are deemed next of kin, are entitled to the same preference in a competition for the office of executor-dative to which the next of kin by the law of Scotland would be entitled.(b) After the next of kin, the widow is next entitled to the office of executor; and, failing an application at her instance, executors-creditors take up the succession according to the rules afterwards explained, and, last of all, special legatees,(c) among which it would appear that the assignee of a beneficial interest is entitled to a place.(d)

Next of kin entitled to office of executor, failing executors-nominate.

Gifts to widow and executors-creditors.

(u) Ersk. *ut supra*; *Crawford v. Ure*, 1755, M. 3818; *Peoch v. Glasgow*, 4 March 1824, 2 Sh. 769, N. E. 639; *M'Gowan v. M'Kinlay*, *infra*.

(x) *M'Gowan v. M'Kinlay*, 4 Dec. 1835, 14 Sh. 105.

(y) Chapter 6, section 1.

(z) 18 Vict., cap. 23, § 1.

(a) *Bones v. Morrison*, 21 Dec. 1866. 5 Macph. 240.

(b) *Marchioness of Hastings v. Marquis of Hastings' Exrs.*, 10 Feb. 1852, 14 D. 489, where the mother, or next of kin by the law of England, was found entitled to the office.

(c) Ersk. 3, 9, 32.

(d) *M'Pherson v. M'Pherson*, 7 Feb. 1855, 17 D. 358.

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Gifts to procurators-fiscal, factors, and foreign consuls. Next of kin may be reponed.

1672. Any person having a legal claim to the office of executor is entitled to the appointment, upon application in the form prescribed by the Statute, in the event of those having a preferable claim failing to appear and oppose the application; and, in practice, it is understood that the Commissary may even appoint a stranger, if there be no applicant possessing a legal title. In such cases the Commissaries were formerly in use to appoint the Procurator-fiscal of Court; but the practice has fallen into desuetude; and the more usual course is to leave the heirs to apply to the Court of Session for the appointment of a judicial factor, to whom confirmation is afterwards granted under the authority of the Act of Sederunt 1730. By 24 & 25 Vict., cap. 121, § 4, where subjects of foreign states shall die in Her Majesty's dominions, and there shall be no persons present who are rightfully entitled to administer to their estates, administration may be granted to the consul, vice-consul, or consular agent of the foreign state in question. With respect to the granting of ancillary administration to executors or other representatives already authorised to act by a foreign court of probate, it has been held that a preferable claimant subsequently appearing may be reponed by the commissary; but this not as of course, but only on just cause shown; for where a party is already in the exercise of the office of executor under a lawful title, he shall not be deprived of that office, unless the competing claimant can show substantial reasons for getting the administration into his hands.^(e) Where a competing claimant for the office of executor challenges the propinquity of an executor decerned in the character of next of kin, the proper remedy would appear to be that of an action of reduction of the testament-dative, or decree of confirmation.^(f)

Judicial factors on trust-estates entitled to the executry under the Act of Sederunt.

1673. By the Act of Sederunt for regulating the administration of factory estates,^(g) it is provided that where it is necessary by law that the money, effects, or moveables, vested in a judicial factor should be confirmed, the said factor may confirm the same in his own name, as executor-dative, and as factor appointed by the Lords of Council and Session on the estate, and for the use and behoof of the person whose estate is under administration, and of all that have and shall have interest, unless some other person having a title offer to confirm. By the same enactment, the factor is required to deposit in the Clerk's hands a copy of the testament-testamentar, and of all eiks he may afterwards make thereto, within the space of three months after the confirmation.

^(e) *M'Pherson v. M'Pherson*, *supra*. ^(f) *Swinton v. Swinton*, 20 March 1862, 24 D. 833.

^(g) Act of Sederunt, 13 Feb. 1730, § 7.

1674. The Pupils Protection Act,^(h) while providing for the grant of special powers by the Court of Session to factors and curators administering the estates of pupils and persons under mental incapacity, makes no special provision with respect to the completion of titles to the ward's property or succession; but we understand that the practice has been for the factor to apply to the Court for authority to make up a title by confirmation in his own name; and this practice, in the analogous case of the Completion of Titles to Heritable Property, has received the sanction of the Legislature.⁽ⁱ⁾ Tutors are not classed by any of the writers of authority among the persons who are entitled to be confirmed executors in respect of their interest in the administration of the ward's succession; and it has been observed that, whether the ward's estate be heritable or moveable, the pupil, and not the tutor, ought to be served to the former, and confirmed to the latter.^(k) But in at least one of the modern cases confirmation by a tutor-at-law has been sustained by the Court;^(l) and, in practice, a grant of executry-dative would not be refused to a tutor applying for it in his own name on behalf of a pupil and next of kin. It has been settled that a minor is entitled to be decerned executor-dative, and in that character to grant discharges to creditors; the Court being of opinion, however, that it was equally competent to confer the office of executor upon his curators in his behalf.^(m)

Factors appointed under Pupils Protection Act may be decerned executors by authority of the Court.

1675. III. EXECUTORS-CREDITORS.—Where no one having a title by relationship or beneficial interest is willing to undertake the administration, or where an executor has neglected to confirm, or has omitted part of the effects in his confirmation, creditors of the deceased may be decerned and afterwards confirmed as administrators of the estate, under the denomination of executors-creditors. Confirmation in this character is regarded rather as diligence than as a proper title of administration;⁽ⁿ⁾ but the forms are similar to those in use in relation to the appointment of executors-dative, and by the Act 21 and 22 Vict., cap. 56, the new procedure is made applicable (§ 2) to the appointment of executors-creditors, “or in any other character whatsoever now competent.”

Appointment of executor-creditor a form of diligence against deceased debtor's estate.

1676. The necessity for the use of this diligence, arises from the circumstance of there being no person representing the deceased

Confirmation unnecessary where diligence begun in debtor's lifetime.

(h) 12 and 13 Vict. cap. 51. See § 7.

(l) *Swayne v. Fife Banking Co.*, 8 June,

(i) 21 and 22 Vict. cap. 76, § 21; 23 and 24 Vict. cap. 143, § 38.

1822, 1 Sh. 479, N. E. 445.

(m) *Johnstone v. Lowden*, 15 Feb. 1838,

(k) *Fraser on Parent and Child* (2d ed.) p. 244; and see *Ersk.* 1, 7, 24.

16 Sh. 541.

(n) *Ersk.* 3, 9, 34, 2 Bell's Com. 5th ed., p. 83.

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against whom an action may be instituted. But where diligence has been commenced during the lifetime of the debtor, and has proceeded so far as to attach funds of the debtor in his lifetime, it may be presented, and will have effect against the estate after his death without the necessity of obtaining confirmation. Thus an arrestment, of which the execution is dated before the debtor's death, will support an action of furthcoming against the common debtor after that event.^(o) But in a competition between arresting creditors and executors-creditors, the criterion of preference is the acquisition of a completed real right, which in the one case is constituted by decree of furthcoming, and in the other by confirmation.^(p) So also, the execution of poinding, or of poinding of the ground before the debtor's death, entitles the creditor to realise the subjects thereby attached, after the death of the party.^(q)

Confirmation
and executor-
creditor where
debt constituted,
but diligence
not begun.

What title will
exclude such
diligence.

1677. If diligence has not been executed in the debtor's lifetime, but the debt is constituted by writing or decree, the creditor may obtain himself decerned executor-creditor, and may follow up his diligence by confirmation in that character, to the effect of administering to so much of the property as may be sufficient for payment of his debt, under the provisions of the Act of Sederunt 14th November 1679, and of the Act 4 Geo. IV., cap. 98, sect. 4.^(r) The decree-dative appointing the creditor to the office of executor-creditor, vests no real right in him until it is perfected by confirmation of the estate which it is intended to attach.^(s) A decree of preference in a multiplepoinding in favour of a creditor of the defunct, is not equivalent to real diligence; and any of the creditors ranked by such a decree may acquire a preference over the others by obtaining themselves confirmed executors-creditors in respect of their claims.^(t) Nor does a title of administration granted by a foreign Court, unconfirmed in Scotland, exclude the diligence of executors-creditors; and therefore, in a case where executors-nominate of a settlement executed in India, after proving the will at Calcutta, raised an action of multiplepoinding in the Court of Session for distribution of the Scotch estate, in which they made consignation of the fund *in medio*, it was held that certain creditors

(o) *Earl of Aberdeen v. Scott's Crs.*, 1738, M. 774.

(p) *Wilson v. Fleming*, 26 June 1828, 2 Sh. 430, N. E. 383. Compare this case with *Sceales v. Russel*, 15 Nov. 1821, 1 Sh. 136, N. E., 182, and *Swayne v. Fife Banking Co.*, 8 June 1822, 1 Sh. 479, N. E. 445, where an arrestment by creditors of a defunct was sustained in competition with

the rights of next of kin; and correct Ersk. 3, 6, 11.

(q) *Earl of Morton v. Somerville*, 1765, M. 6197.

(r) 4 Geo. IV., cap. 98, § 4.

(s) *Wilson v. Fleming*, *supra*; and see *Cust v. Garbet & Co.*, 1795, M. 2795; *Carmichael v. Carmichael*, 1745, M. 9267.

(t) *Anderson v. Stewart*, 24 Nov. 1831, 10 Sh. 49.

of the defunct, who confirmed to the Scotch estate as executors-creditors, had thereby secured a preference over other claimants. (u) Even after the elapse of the period of six months allowed by the Court for the acquisition of preferences upon the moveable estate, (x) any creditor whose claim of debt is constituted, is entitled to be conjoined in the office of executor-creditor, and may compel the creditor first decerned to concur with him in obtaining confirmation. (y)

1678. Where the debt is not constituted by writing or decree, the creditor must proceed to constitute it under the provisions of the Statute 1695, cap. 41, (a) by charging the next of kin to confirm as executor to the deceased within twenty days; after the expiration of which time he may have action and decree either against the executor, if he confirm, or *contra hæreditatem jacentem*, if he renounce; and upon this the creditor may obtain himself decerned and confirmed as for a liquid debt. Next of kin, charged to confirm according to the Statute, must elect either to confirm or to renounce the succession. If they take no notice of the charge, and an action is afterwards brought against them as vitious intromitters, they may still escape personal liability by lodging a minute of renunciation, but will be liable to the creditor in the expense of any proceedings which may have been rendered necessary by their failure timeously to renounce. (b)

Constitution of debt against estate or representatives in order to confirmation *quâ* executor-creditor.

1679. To complete this branch of the subject, it is necessary to consider the means by which the estate taken up by an executor may be attached during his lifetime, or after his death, either by his own creditors, or by those of his ancestor whom he represents.

How a creditor may attach estate already vested in an executor by confirmation.

(u) *Smith's Trs. v. Grant*, 27 June 1862, 24 D. 1143; and see *Clarke v. Edgar*, 1810, Hume, 175.

(x) Act of Sederunt, 28 Feb. 1662.

(y) *Gibbon v. Johnston*, 1787, Hume, 276; *Willison v. Smart*, 17 Dec. 1840, 3 D. 273; *Lee v. Donald*, 17 May 1816, F.C.

(a) Statute 1695, cap. 41:—"And it is further declared, That in the case of any depending cause or claim against a defunct, the time of his decease, it shall be leisume to the pursuer of the said cause or claim to charge the defunct's nearest of kin to confirm executor to him within twenty days after the charge given; which charge so execute shall be a passive title against the person charged, as if he were a vitious intrometter, unless he renounce, and then the charger may proceed to have

his debt constitute, and the *hæreditas jacens* of moveables declared liable by a decret *cognitionis causa*; upon the obtaining whereof, he may be decerned executor-dative to the defunct, and so affect his moveables in the common form." As to the procedure under this Statute, as explained by 4 Geo. IV., cap. 98, see *Greig v. Christie*, 1 March 1887, 15 Sh. 697. It would seem that the same object may be obtained without the preliminary of a charge, where the pursuer restricts his demand to a claim for decree *cognitionis causa tantum*, but if he insists in the action against the heir personally, the heir will be entitled to absolvitor; *Forrest v. Forrest*, 26 May 1863, 1 Macph. 806.

(b) *Davidson v. Clark*, 13 Dec. 1867.

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Preference of
executor's credi-
tors to heirs.

Whether forms
of the Act 1695
applicable to case
of claim against
next of kin who
die unconfirmed.

Two cases may be distinguished; and first, where the executor has obtained confirmation, the executry estate may be confounded with his own so that they cannot be discriminated, in which case the creditors of either class must proceed by way of action against the executor in his lifetime, or by the diligence of confirmation as executor-creditor of such executor after his death. And where the executry funds are distinguishable, the mode of procedure is the same; only the creditors of the defunct person represented by the executor have a preference over those of the executor himself within the period of a year from the death of such defunct person. (c) Where the executor has not obtained confirmation, his personal creditors may apply to be decerned and confirmed executors-creditors, as if they were directly creditors of the ancestor; or they may require the Procurator-fiscal of the Commissary Court to confirm as executor-dative, and then to assign to them. In this case, also, creditors of the ancestor using the diligence of confirmation have a preference over creditors of the ancestor, within the period of a year subsequent to the ancestor's death. (d)

1680. The remedy given by the first branch of the Statute 1695, cap. 41, would, in the state of the law at that time, cease to be applicable after the death of an executor *qua* next of kin unconfirmed; because, confirmation being necessary to vest the estate, the right of the executor to the specific estate would become lapsed, and the right of his personal creditors to attach the estate would fall with it. But since by 4 Geo. IV., cap. 98, the right of the next of kin vests by survivance, and is continued to their representatives after their death, it would seem that the remedy given to their creditors by the first branch of the Scottish Statute ought to receive a corresponding extension, a view which is supported, if not directly recognised, by the judgment on one of the points in *Smith's Trustees v. Grant*. (e) Subjects to which an executor-nominate or disponee has right by special assignation cannot be attached by the diligence of confirmation, as they are not held to be *in bonis* of the defunct.

(c) See *Christie v. Allan*, 27 June 1835, 18 Sh. 938.

(d) Statute 1695, cap. 41, entitled, Act anent Executry and Moveables:—"That in the case of a moveable estate left by a defunct, and falling to his nearest of kin, who lies out, and doth not confirm, the creditors of the nearest of kin may either require the Procurator-fiscal to confirm and assign to them, under the peril and pain of his being liable for the debt if he refuse,

or they may obtain themselves decerned executors-dative to the defunct, as if they were creditors to him: With this provision always, that the creditors of the defunct, doing diligence to affect the said moveable estate, within year and day of their debtor's decease, shall always be preferred to the diligence of the said nearest of kin."

(e) *Smith's Trs. v. Grant*, 27 June 1862, 24 D. 1142 (first point).

The creditor in this case must proceed by action against the executor. (f) CHAPTER LII.

1681. Professor Bell, in commenting upon the Statute 1695, observes that the preference of the ancestor's creditors to the successor's existed at common law, and that the object of the Statute was to restrict it to a reasonable period. (g) The same author observes that the Statute applies in terms only to the case where the executor is not confirmed; that it is doubtful how far the preference given to the creditors of the ancestor, where the executor has confirmed, depends on common law or on the Statute; but that, assuming that it exists at common law, it follows that the preference will subsist even after the expiration of the year, in whatever way the executry has been taken up, provided the fund can be clearly identified. (h) But, in the absence of any modern decision confirmatory of these views, it would not be safe to rely upon the existence of the preference in question beyond the duration of the statutory period. By Act of Sederent 14 Nov. 1679 it is declared that executors decerned and confirmed as creditors to the defunct are holden and liable to do diligence for recovery of the defunct's goods, and the debts due to him, confirmed in the testament, or eiked, siclike as other executors-dative are holden to do by the law and practique of this kingdom. The liability in question may be enforced either by their creditors, or by the next of kin or legatees for their reversionary interest.

Whether preference of ancestor's creditors existed at common law.

Diligence prestable by executors-creditors.

1682. The confirmation of an executor-creditor attaches only so much of the subject confirmed as is necessary to satisfy his claim against the estate. The radical interest in the fund still remains in *bonis defuncti*, and may be attached by other creditors by successive confirmations. This is explained in Lord Curriehill's opinion in *Smith's Trs. v. Grant*, (i)—“In this respect there is no difference between diligence after the death of a debtor as to moveable and as to heritable estate. A creditor brings an action of constitution against his debtor's heir, who is unentered; the heir on being charged to enter gives in a renunciation, a decree *cognitionis causa* is pronounced, and on that decree the creditor attaches the heritable estate by adjudication; but though the whole estate is attached the adjudication merely operates as a burden upon it. Other creditors go through the same process, and, after all, the heir may make

Confirmation of executors-creditors only creates a nexus. Competency of successive confirmations.

(f) *Bell v. Williams*, 18 Jan. 1881, 9 Sh. 266; *Innerarity v. Gilmore*, 7 March 1840, 2 D. 813.

(g) 2 Bell's Com. 5th ed. 89, 90, and cases there referred to.

(h) Bell's Com., *ut supra*, citing Dirleton, *voce* “Executor,” 92; *Tait v. Kay*, 1779, M. 8142.

(i) *Smith's Trs. v. Grant*, 24 D. 1169 (slightly abridged).

CHAPTER LII. up a title by service and entry with the superior. The diligence of the creditors of the defunct against his moveables is of the same legal character in this respect, that the diligence of each of them merely creates a burden or a *nexus* upon the estate, and that the estate is always subject to be attached by other parties under the burden of the debts so created upon it."

Appointment
and confirma-
tion of executors
ad omissa vel
male appreciata.

1683. IV. EXECUTORS AD OMISSA, MALE APPRECIATA AND AD NON EXECUTA.—Proper executors, who hold office for the benefit of all interested in the moveable succession, are, as will be seen, obliged to confirm to the whole moveable estate of the deceased. Where, however, the executor confirmed has either omitted out of the inventory any effects belonging to the deceased, or has estimated them below their just value, any person interested in the succession is entitled to apply to the commissary in order that he himself may be confirmed executor to the deceased *ad omissa vel male appreciata*; and in support of the application it is competent to prove by witnesses that the goods confirmed in the testament were under valued. (j) And by the Act of Sederunt of 14 Nov. 1679, which on this point is in harmony with the provisions of 4 Geo. IV., cap. 98, it is declared that executors-creditors shall not be obliged to make a total confirmation, but only of so much as they shall think fit, that there may be place for an executor *ad omissa* for the rest, who shall be liable to all parties having interest, in the same way as principal executors. Where an executor has intromitted with subjects not contained in his confirmation, the creditors of the deceased may either proceed to confirm these subjects *ad omissa*, or may, without such confirmation, pursue the executor directly for their value. (k) A creditor confirming *ad omissa* has been held entitled to call another creditor partially confirmed to account for what he has drawn beyond the sum confirmed.

Conjunction of
creditors in such
appointments.

1684. A creditor who has obtained a partial confirmation is not entitled to eik to his confirmation after another creditor has applied for confirmation *ad omissa*; but he is entitled to be conjoined with the latter, if he applies before the confirmation *ad omissa* is carried through. (l) Where, however, a proper executor has, without fraud, omitted to include a part of the ancestor's estate in his inventory, the Commissary has a discretion, instead of granting decree-dative in respect of the subject omitted, to allow the executor to add the value of it to the inventory; and, in view of the obvious inconveniences of a divided administration, it is required in practice that

(j) Ersk. 3, 9, 36.

(l) *Lee v. Donald*, 17 May 1816. F.C.

(k) Ersk. 3, 9, 36, citing *Inglis v. Bell*, 1689, M. 2737.

a creditor applying for confirmation *ad omissa* should call the proper executor as a party to the proceeding. (m) CHAPTER LII.

1685. It is the office of an executor to realise the estate of the ancestor in order to its distribution amongst those who have the legal interest in it. A testament, however, is said to be *executed*, in the proper and legal sense of the term, when the executor has obtained possession of the moveables belonging to the deceased, and has received payment of the debts due to the estate, or at least established his right to them by decrees or corroborative securities. (n) For the *distribution* of the estate, the peculiar authority incident to the office of executor is not absolutely required; because the estate, if once vested in the executor, may be taken out of his person, or that of his successors by diligence. But should the executor die before completing the realisation of the ancestor's estate, a new appointment is requisite. We have elsewhere seen that the office of the executor is a personal trust, which, although accruing to survivors, does not descend to heirs or representatives. (o) In those cases, therefore, where the office of executor falls by death before the testament is fully executed, the Commissary has authority to make an appointment of an executor-dative *quoad non executata*, as if there had been no former confirmation, for realising that part of the estate which had not been reduced into possession in the lifetime of the first-appointed executor. The confirmation of executor *qua* nearest of kin, being a beneficial appointment, vests the estate in such a manner that on the death of the next of kin confirmed, the estate may be taken up by their representatives, as *in bonis* of their immediate ancestor; and in such cases a new appointment *ad non executata* is superfluous.

1686. Following out the principle of appointment *ad non executata*, it is provided by the Statute 4 Geo. IV., cap. 98, § 1, that confirmation may be granted to the representatives of a next of kin of an intestate who has died without confirming, "in the same manner as confirmation might have been granted to such next of kin immediately upon the death of such intestate." Where, however, a grant of executry-dative made to an applicant as trustee for others falls by the death of the executor, a new appointment *ad non executata* is still requisite; and, in the practice of the Commissary Court of Edinburgh, the appointment is given as of course to the heir of line of the deceased executor, or of the last surviving trustee if the original appointment were to a plurality of persons. As, how-

In what cases an appointment may be made of an executor *ad non executata*.

Grant of executry to representatives of deceased next of kin under 4 Geo. IV., c. 98.

(m) Ersk. 3, 9, 87.

(n) Ersk. 3, 9, 38.

(o) *Supra*, § 1660, and see chap. 54, sect. 2; Ersk. 3, 9, 38.

CHAPTER LII. ever, the realisation of the personal estate is usually a matter of no long duration, applications for the appointment of executors *ad non executa* are not very common. (p) The liability of executors *ad non executa* appears to be the same as that of assumed trustees; that is to say, they are not responsible for the executors to whom they succeed, but are bound to call their representatives to account for their intromissions, and, if necessary, to proceed against them according to the rules of exact diligence. (q)

(p) On the subject of this and the preceding paragraphs see Ersk. 8, 9, 86 to 88.

(q) *Nicol & Carny v. Wilson*, 10 June 1856, 18 D. 1000.

CHAPTER LIII.

OF CONFIRMATION.

1687. The title of an executor, whether derived from the appointment of the deceased or from the sentence of the Commissary, is purely personal. By confirmation it is raised to the character of a real right, vesting in the executor the legal title and estate of the deceased's succession, with all right of action and execution thereto appertaining. Although no longer necessary for vesting a beneficial interest in the next of kin, it is still essential to the completion of an administrative title, and to the acquisition of a preferential right on the part of executors-creditors. "Confirmation," says Erskine,^(b) "may be defined to be a sentence of the judge competent authorising an executor, one or more, upon making inventory of the moveable estate and debts due to the deceased, to sue for, recover, possess, and administer the whole, either for the behalf of themselves, or of others interested therein." Where the title of an executor-nominate is confirmed by the judge, it is called the confirmation of a testament-testamentar, and when the judge confers the office of an executor upon a person of his own nomination, it is styled the confirmation of a testament-dative.^(b) Confirmation is granted by the Commissary Court of the county in which the deceased died domiciled or had his principal residence; and, in the case of strangers, by the Commissary Court of Edinburgh.

1688. By the common law of Scotland confirmation was necessary not only to establish the executor's title of administration, but also (unless where the estate had been reduced into possession) to vest the beneficial interest in the next of kin, insomuch that upon the death of the latter, without confirmation or reduction of the estate into possession, no right transmitted to their creditors or personal representatives.^(c) But by 4 Geo. IV., cap. 98,^(d) it is en-

(a) Ersk. 3, 9, 27.

(b) Ersk. *ut supra*.

(c) Ersk. 3, 9, 30; 2 Bell's Com. 5th ed.

(d) § 1. The date of the Statute is 19 July 1828.

Rule that confirmation necessary to vest beneficial interest abrogated by 4 Geo. IV., c. 98.

CHAPTER LIII. acted "that from and after the passing of this Act, in all cases of intestate succession, where any person or persons, who at the period of the death of the intestate, being next of kin, shall die before confirmation be expedite, the right of such next of kin shall transmit to his or her representatives, so that confirmation may and shall be granted to such representatives in the same manner as confirmation might have been granted to such next of kin immediately upon the death of such intestate." Under this enactment the next of kin are by mere survivance vested in the right of succession, to the effect of transmitting it, not only to their legal representatives, but to assignees(*e*) and creditors(*f*) Although the Statute is not retrospective, yet the form of expression "any person or persons who being next of kin *shall* die before confirmation be expedite," manifestly extends the benefit of its provisions to all next of kin surviving the passing of the Act, notwithstanding that the succession occurred anterior to its date, 19th July 1823; and the Statute has been so interpreted(*g*)

What subjects vest in possession without the necessity of confirmation.

1689. Under the old law there are several recognised exceptions to the rule that personal estate did not vest without confirmation. These it is not necessary to consider minutely; the distinction in question being now only operative, if at all, in relation to the use of diligence by creditors of the defunct(*h*) The exceptions may be reduced to three heads: *first*, by 1690, cap. 26, (*i*) special assignments granted by the deceased, though neither intimated nor made public in his life, were declared sufficient to convey to the assignee the full right of the subjects assigned, without confirmation; and special legacies were held to be equivalent to assignments under the Statute; (*k*) nor was confirmation necessary to vest the right of a beneficiary or general disponee under a testamentary settlement(*l*) any more than service is now requisite in the case of beneficial interests in heritage similarly constituted(*m*) And accordingly, the Act of Geo. IV., for the better regulation of confirma-

(*e*) *Smith v. Thomas*, 9 Feb. 1830, 8 Sh. 468.

(*f*) *Frith v. Buchanan*, 8 March 1837, 15 Sh. 729; *Mein v. McCall*, 7 June 1844, 6 D. 1112.

(*g*) *Cunningham v. Farie*, 15 Jan. 1856, 18 D. 312. This distinction appears to have been overlooked in the observations *obiter* of Lord Curriehill in *Beattie's Trs. v. Cooper's Trs.*, 24 D. 536.

(*h*) See *Bell v. Willison*, 13 Jan. 1831, 9 Sh. 266; *Innerarity v. Gilmore*, 7 March 1840, 2 D. 818, where subjects so assigned

were held to be attachable by arrestment and not by confirmation.

(*i*) The effect of this Statute is reserved by 4 Geo. IV., cap. 98, § 3.

(*k*) *Gordon v. Campbell*, 1729, M. 14,384; *Lyle v. Lyle*, 2 Dec. 1842, 5 D. 236; *Wright v. Turner*, 7 March 1855, 17 D. 629.

(*l*) *Robertson v. Gilchrist*, 25 Jan. 1828, 6 Sh. 446; *Christie v. Dun*, 1806, M. "Provisions to Heirs and Children," App. No. 5.

(*m*) *Greig v. Malcolm*, 5 March 1835, 13 Sh. 607.

tions, is applicable in terms only to the succession of next of kin *ab intestato*.(n) Secondly, confirmation was not necessary on the part of the widow and children to vest in them, or transmit to their next of kin, the shares of the moveable succession accruing to them by the titles of *jus relictæ* and legitim.(o) But although the rights of the widow and children vest *ipso jure*, no direct action will lie at their instance against the debtors of the deceased, but only through the medium of the executor.(p) Thirdly, such moveables as were susceptible of actual possession, and were reduced into possession by the next of kin in their lifetime, were held to vest without confirmation.(q) Whether a partial confirmation had the effect of vesting the beneficial interest in subjects not actually confirmed, appears to have been a doubtful question.(r) It may be added that the confirmation of an executor, nominate or dative, although merely in trust for the next of kin, had the effect of establishing their right to the subject confirmed as effectually as if the confirmation had been in their own names.(s)

1690. Under the former law, it was held that personal estate situated in England vested in the next of kin by survivance, without confirmation, in accordance with the law of that country; (t) and this, although both the ancestor and the next of kin were domiciled in Scotland.(u) How far these decisions are reconcilable with sound views of international jurisprudence has been the subject of consideration in a previous chapter.(x) The distinction on which they proceed is, that while the law of the domicile determines the right of succession, the question, whether any and what process in the nature of an *aditio hæreditatis* is necessary to vest the interest, falls within the cognisance of the local law under the authority of which the estate is to be administered. In conformity with this principle it is held, conversely, that probate granted by a foreign court does not vest the executor with a title of administration to the personal estate situated in Scotland, nor prevent the attachment of that estate by executors-creditors.(y)

Confirmation not required in relation to personal estate which is not locally situated in Scotland.

(n) 4 Geo. IV., cap. 98, § 1.

(o) Chapter 6, section 2 (Intestate Succession in Moveables). In the case of *Smith v. Barlas*, 15 Jan. 1857, 19 D. 267, it was held that a father sued by his child for the wife's share of the goods in communion, could not be required to make up a separate title by confirmation to her share.

(p) *M'Kie v. Dunbar*, 1628, M. 1788.

(q) *M'Whirter v. Miller*, 1744, M. 14,895. Compare this case with *Ogilvie v. His Majesty's Advocate*, 1670, M. 3916.

(r) Compare Ersk. 8, 9, 80, par. 4, and cases there cited, with *Alison v. Scollay's Crs.*, 1802, M. 3922.

(s) Ersk. *ut supra*.

(t) *Egerton v. Forbes*, 27 Nov. 1812, F.C.; *Craigie v. Gairdner*, 12 June 1817, F.C.

(u) *Milligan v. Milligan*, 9 Feb. 1826, 4 Sh. 482, N. E. 488.

(x) Chap. 2, sect. 5 (International Law).

(y) *Smith's Trs. v. Grant*, 27 June 1862 24 D. 1142.

CHAPTER LIII.

Ancient practice in relation to confirmations of personal estate.

1691. As to the manner of obtaining confirmation, it proceeds in every case upon an inventory of the executry estate given up by the executor in the Commissary Court. In the practice of the ancient Ecclesiastical Courts, it was requisite that the inventory should be given in upon oath; and that it should include the whole of the moveable estate. In case of failure, the next of kin, or others entitled to the office of executor, were charged to confirm at the instance of the Procurator-Fiscal of the Court; as in this way only could the right of the clergy to their shares of the succession, called Quots, be effectually secured. Notwithstanding the abolition of quots, the practice of charging the next of kin to confirm was continued until the year 1690, when it was prohibited by Act of Parliament.^(z) From that time until the imposition of inventory-duty, it was considered that the executor did not lie under any obligation to confirm to more of the estate than he pleased.^(a)

By Statute, executor must now confirm the whole estate of the deceased according to inventory.

1692. But by the Revenue Statutes, 44 Geo. III. cap. 98, sect. 23, and 48 Geo. III., cap. 149, sect. 38, executors applying for confirmation are required, on or before disposing of, or distributing any part of the estate or effects, or uplifting any part of the debts due to the deceased, and at all events within six calendar months next after having assumed the possession or management thereof, in whole or in part, and before confirmation, to exhibit upon oath or solemn affirmation in the proper Commissary Court in Scotland, a full and true inventory, duly stamped, of all the personal or moveable estate and effects of the deceased already recovered or known to be existing, distinguishing what is situated in Scotland and what elsewhere, together with any testament or other writing relating to the disposal of such estate and effects, or any part thereof, which the executor exhibiting the inventory shall have in his custody or power; which inventory, together with the testament, if any, shall be recorded in the Books of the Court upon payment of the ordinary fees. By the Act of Geo. IV., for the better granting of Confirmations in Scotland,^(b) it is enacted, that every person requiring confirmation shall confirm the whole moveable estate of the deceased person known at the time, to which such person shall make oath;

^(z) 1690, c. 26: It is also declared "that where special assignments and dispositions are lawfully made by the defunct, though neither intimate nor made publick in his lifetime, they shall be yet good and valid rights and titles to possess, bruik, enjoy, pursue or defend, albeit the sums of money or goods therein contained be

not confirmed; without prejudice always to the competition of creditors and others, and of their rights and diligences as formerly before the making hereof." Ersk. 8, 9, 83.

^(a) Ersk. *ut supra*.

^(b) 4 Geo. IV., cap. 98, § 8.

and by the fourth section it is provided that, in the case of confirmation by executors-creditors, such confirmation shall be limited to the amount of the debt and the sum confirmed, to which such creditors shall make oath.

1693. By the 40th section of the Act of 48 Geo. III., as amended by 4 Geo. IV., cap. 98, and 16 & 17 Vict., cap. 59, § 8, provision is made with reference to the case of estate afterwards discovered, and not included in the original inventory. In this case, the executor is required to give in an additional inventory, which must specify the amount of the whole succession, including what has been omitted by accident or error in the previous schedule. By a recent Act, money secured on heritable property, as also money secured by bonds in favour of heirs and assignees, excluding executors, must be scheduled in the inventory; and such monies are chargeable with stamp-duty in respect of such inventory or equivalent probate or letters of administration. (c) Funds invested in the name of the deceased in trust, do not fall to be included in the inventory of his estate; because such funds are not considered to be a part of his succession.

Confirmation of additional estate not included in the original inventory.

Estate in trust.

1694. The procedure to be followed in the obtaining confirmation of personal estate is now regulated by 21 & 22 Vict., cap. 56, to which reference is made in the preceding section. Under this Statute, executors applying for confirmation in Scotland, or probate or letters of administration in England or Ireland, are required to confirm or prove the whole personal estate of the deceased situated within the United Kingdom, and the effect of such confirmation, probate, or letters of administration granted in one part of the kingdom, is extended so as to give a title of administration within every part of the United Kingdom. By section 8(d) inventories of personal estates and relative testamentary writings may be given up and recorded in, and confirmations may be granted and issued by, any Commissary Court to which it is competent to apply in virtue of the provisions of the Act, for the appointment of an executor-dative to the deceased.

Forms of obtaining confirmation now regulated by 21 & 22 Vict., cap. 58.

1695. The Statute deals, in the next place, with the effect to be given to probate and confirmation by the Courts of other parts of the kingdom. By section 9 it is provided, that "it shall be competent to include in the inventory of the personal estate and effects of any person who shall have died domiciled in *Scotland*, any per-

Confirmation to include the deceased's personal estate in England and Ireland.

(c) 23 & 24 Vict., cap. 15, § 6.

(d) The Statute applies to every description of executors; and there is nothing in the procedure in confirmations of executors *ad omnia*, &c., which seems to

call for special notice; the nature of the office and estate of such executors having been fully considered in the preceding section.

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personal estate or effects of the deceased situated in *England* or in *Ireland*, or both; provided that the person applying for confirmation shall satisfy the Commissary, and that the Commissary shall, by his interlocutor, find that the deceased died domiciled in Scotland, which interlocutor shall be conclusive evidence of the fact of domicile; provided also that the value of such personal estate and effects, situated in *England* or *Ireland* respectively, shall be separately stated in such inventory, and such inventory shall be impressed with a stamp corresponding to the entire value of the estate and effects included therein, wheresoever situated within the United Kingdom."

Confirmation, when sealed with the seal of the Court of Probate in *England*, to have the effect of probate.

1696. Section 12 provides, that "when any confirmation of the executor of a person who shall in manner aforesaid be found to have died domiciled in Scotland, which includes, beside the personal estate situated in *Scotland*, also personal estate situated in *England*, shall be produced in the principal Court of Probate in *England*, and a copy thereof deposited with the Registrar, together with a certified copy of the interlocutor of the Commissary finding that such deceased person died domiciled in *Scotland*, such confirmation shall be sealed with the seal of the said Court, and returned to the person producing the same, and shall thereafter have the like force and effect in *England* as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate." (e) The same provision is, by section 13, extended to confirmation to the estate of a person who had died domiciled in Scotland, which includes, besides the personal estate situated in Scotland, also personal estate situated in *Ireland*, on such confirmation being produced in the Court of Probate in Dublin.

Idem, as to *Ireland*.

Probate, when indorsed by the Commissary Clerk, to be equivalent to confirmation.

1697. By section 14 it is provided, that when any probate or letters of administration, to be granted by the Court of Probate in *England* to the executor or administrator of a person who shall be therein—or by any note or memorandum written thereon, signed by the proper officer—stated to have died domiciled in *England*; or by the Court of Probate in *Ireland* to the executor or administrator of a person who shall in like manner be stated to have died domiciled in *Ireland*, shall be produced in the Commissary Court of the county of *Edinburgh*, and a copy thereof deposited with the Commissary Clerk of the said Court,—the Commissary Clerk shall indorse or write on the back or face of such grant a certificate in

(e) In *Hawarden v. Dunlop*, 31 L. J., Pr. & M. 17, Sir C. Creswell doubted whether, under this clause, the interlocutor of the Commissary was conclusive on the question of domicile. The object of

the Statute was, he thought, to render an application for probate unnecessary, but not to exclude the parties from a hearing in Court if desired.

the form prescribed in the schedule annexed to the Act, and such probate or letters of administration, being duly stamped, shall be of the like force and effect, and have the same operation in Scotland as if a confirmation had been granted by the said Court. CHAPTER LIII.

1698. By section 15 it is provided, that where the deceased shall be stated in the probate or letters of administration to have been domiciled in England or in Ireland, as the case may be, such probate or letters shall, for the purpose of securing payment of the full stamp-duties, be considered to be granted for the whole of the personal and moveable estate of the deceased in the United Kingdom, within the meaning of the Act 55 Geo. III., cap. 184, and of all other Acts relating to stamp-duties on probates and letters of administration in England and Ireland respectively; that the affidavit required by law to be made on applying for probate or letters of administration in England or Ireland as to the value of the estate and effects of the deceased—and where the Commissary shall find that the deceased was domiciled in Scotland, the inventory to be exhibited and recorded in the proper Commissary Court in Scotland before obtaining confirmation, or intromitting with or entering upon the possession and management of the estate in Scotland—shall respectively extend to and include the whole of the personal and moveable estate of the deceased in the United Kingdom, and the value thereof; and the stamp-duties for the time being chargeable on probates and letters of administration, and on inventories, respectively, shall be chargeable upon any probate or letters of administration to be granted, and any inventory to be exhibited and recorded as aforesaid respectively, for the whole of the personal and moveable estate of the deceased in the United Kingdom, and the value thereof; and the said affidavit shall also separately specify the value of the said estate and effects in Scotland. And section 17 provides, that in any case where, on applying for probate or letters of administration, it shall be required to be stated that the deceased was domiciled in England or in Ireland, the affidavit shall specify the fact according to the deponent's belief, which shall be sufficient to authorise the same to be stated in the probate or letters of administration. By this section it is also provided, that any such statement, and the interlocutor of the Commissary finding that the deceased was domiciled in Scotland, shall be evidence and have effect for the like purposes.

Probate, letters of administration. Inventory made applicable to United Kingdom for purpose of collecting duties.

Affidavit of domicile according to belief, sufficient for purposes of probate or confirmation.

1699. The form of confirmation is regulated by section 10 and relative schedule, according to which the testamentary instrument is referred to as recorded in the books of the Commissary Courts. With respect to confirmations of foreign wills, the practice in the

Forms.

Confirmation of foreign wills.

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Commissary Court of Edinburgh is to receive and record an official copy, if it has been proved in the country from which it comes. If it has not been already proved, the original will must be produced. In either case, the will, if expressed in a foreign language, must be accompanied with a translation ; and in doubtful cases the Commissary Clerk is authorised to call for an opinion by a barrister of the foreign country, certifying that the will is valid and executed in conformity with the laws of that country. (*f*)

Double confirmation requisite where immediate representative dies unconfirmed ;

except in the case of confirmation *quâ* next of kin.

Confirmation not necessary to give a title to sue.

1700. Where a representative is to confirm to a person who has died unconfirmed, a double confirmation is necessary. In cases of testate succession, the executor (or assignee) of an executor-nominate who has died without confirming, confirms first to the executor-nominate deceased from whom his title is immediately derived, giving up in his inventory the beneficial interest which the deceased executor-nominate had in the estate of his ancestor ; and then, in the second place, he confirms to that ancestor, as disponee or executor-creditor, giving up in the inventory the debts or effects to which he means to make up a title. As to intestate succession, the relation of the applicant or second executor to the remoter ancestor is in substance the same ; but, as the Statute of Geo. IV. gives to such second executor or representative the right to confirm “in the same manner as the next of kin are entitled to be confirmed immediately on the intestate’s death,” it is, on this ground, the practice to confirm at once.

1701. With reference to the necessity of confirmation to perfect the executor’s administrative title, a distinction has been recognised between the title to sue and the title to discharge. Under the old law an executor, nominate or dative, who was desirous of avoiding the expense of confirming doubtful debts, might obtain from the Commissary a license to sue for payment, which was granted upon the condition that he should confirm before decree of payment. (*g*) But in our modern practice an executor, nominate or dative, is held to have a title to sue in virtue of his appointment, subject to the condition of confirming the debt before extract. (*h*) “A general

(*f*) In England the practice appears to be to grant probate of a translation of the will alone ; a practice which seems open to serious exception. In *Wylie v. Enohin*, 29 L. J. Ch. 841, it was doubted whether the Court had power to question the accuracy of the translation, as the original had not been proved. However, the Lords Justices put some questions to witnesses acquainted with the language of the will, and being satisfied that the translation

was accurate, it became unnecessary to consider the question of competency.

(*g*) Ersk. 8, 9, 89.

(*h*) *Bones v. Morrison*, 21 Dec. 1866, 5 Macph. 240 ; *Chalmers Trs. v. Watson*, 12 May 1860, 22 D. 1060 ; *Stevenson v. Mac-laren*, 1800, Hume, 171. A foreign appointment is a sufficient title to sue, but its authenticity must be attested by the signature of a notary, British consul, or resident official of the locality ; *Dishrow v.*

disposition unconfirmed," as observed by Lord Ivory, "is a license to sue, and so is a decree-dative. The title which the trustees have, though not a title to discharge, nor under which payment could be enforced, is in many respects a perfectly legal title, and is so recognised in law, and may have a retro-active effect at any time before extract, even to the effect of legalising intermediate diligence, which otherwise would be imperfect."*(i)* The debtor seems to be entitled to require that the condition to confirm before extract should be inserted in the decree.*(k)* The rule extends to executors-creditors.*(l)* Where an executor died after obtaining decree, and without having confirmed, it was held that the fund which was the subject of the decree could not be taken up by his representatives as *in bonis* of the executor; and that the proper course for the representatives was to appear in the process, and obtain a new decerniture in their own names. Baron Hume, who reports the case, observes that a judgment thus qualified, and obtained on the title of a decree-dative, which evanishes by the death of the pursuer unconfirmed, is to be considered as truly no decree; so that the next of kin may still appear and have a transference, as in the case of a depending action.*(m)*

1702. Confirmation, however, is necessary to vest the executor with a title to discharge; and where an executor sues for payment in full of a debt which he has valued at a smaller sum in the inventory, he may be required before payment to add to the inventory, and pay duty on the excess.*(n)* A debtor who pays to an executor or next of kin unconfirmed takes the risk of his title; and if the latter is found not to have the substantial right, any other person having a right and lawfully obtaining confirmation may compel the debtor to pay over again.*(o)* The rule is subject to the exceptions noticed in treating of the vesting of the succession by confirmation under the common law; for, as confirmation was dispensed with in the case of subjects specially assigned to the executor, or reduced into possession without the necessity of legal process, the possession from which his title was derived was also deemed a sufficient title

Debtor is entitled to require confirmation before paying to the executor.

Mackintosh, 27 Nov. 1852, 15 D. 123. A decree obtained by next of kin who have not been appointed executors or obtained administration from a competent court, is bad, and no execution can follow upon it; *Malcolm v. Dick*, 8 Nov. 1866, 5 Macph. 18.

(i) 22 D. 1064.

(k) *Fyffe v. Ferguson*, 6 July 1842, 4 D. 1482.

(l) *Maitland v. Cockerell*, 28 Nov. 1827,

6 Sh. 109; *Dickson v. Barbour*, 27 May 1828, 6 Sh. 856.

(m) *Stevenson v. M'Laren*, *ut supra*.

(n) *Williamson v. Fraser*, 18 Nov. 1882, 11 Sh. 7; *Brown v. Moffat*, 16 Dec. 1853, 16 D. 225.

(o) *Taylor v. Sir Wm. Forbes & Co.*, 9 June 1827, 5 Sh. 785, N. E. 782; *Buchanan v. Royal Bank of Scotland*, 8 Nov. 1842, 5 D. 211.

CHAPTER LIII. for the granting of discharges. (p) A general disposition, though sufficient by the common law to vest the beneficial interest, is not in itself a title of administration. (q)

(p) See § 1689 *supra*, and authorities there cited; also *Elder v. Marshall*, 3 Dec. 1880, 9 Sh. 133. To this rule may also be referred the cases where an executor's title has been held sufficiently established without confirmation by the granting of bonds

of corroboration; *Watson v. Marshall*, 1782, M. 7009; or the payment of interest on the debt, *Robertson v. Gilchrist*, 25 Jan. 1828, 6 Sh. 446.

(q) See *Dobie v. Oliphant*, 1707, M. 14,390; *Robertson v. Gilchrist*, *supra*.

CHAPTER LIV.

OF THE OFFICE OF A TRUSTEE.

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| <p>I. <i>Disability to enter into Personal Transactions.</i></p> <p>II. <i>Office is Joint and Transmits to Survivors.</i></p> | <p>III. <i>Trustees Act by a Majority.</i></p> <p>IV. <i>Office at Common Law cannot be delegated.</i></p> |
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SECTION I.

DISABILITY OF TRUSTEES TO ENTER INTO PERSONAL TRANSACTIONS.

1703. Trust, in the eye of the law, is regarded as a gratuitous office, being in this respect analogous to the civil law contract of mandate. (a) At one time this doctrine was applied even to trusts in insolvency; (b) but since it has been found by experience that trusts of this nature are best managed by professional persons, bound to give continuous attention to their affairs, it has been usual to stipulate for the remuneration of such trustees by commission; and even in the absence of express stipulation, custom has sanctioned the right to remuneration in this form. (c)

Trust a gratuitous function. Exception in the case of trustees for creditors.

1704. By acceptance of the office, a trustee comes under an implied obligation, not only to execute the purposes of the trust fairly and discreetly, but also to maintain a disinterested position in all transactions into which he may enter for the benefit of the estate. Accordingly, trustees, both in England and Scotland, are held to be absolutely precluded from entering into any personal transactions in which the trust-estate has an adverse interest.

Rule that a trustee cannot be *auctor in rem suam*.

1705. The principle, that a trustee cannot be *auctor in rem suam* has been variously stated by writers of authority. Mr Lewin describes it, that there is "a general rule established, to keep trustees within the line of their duty, that they shall not derive any

Reason of the rule, and examples of its application.

(a) Stair 1, 12, 5; Ersk. 3, 3, 32; Bell's Pr. § 1993-5. Although not entitled to charge for services performed personally, trustees have, of course, the right to transact the business of the trust through an agent, and to take credit for the remuneration paid to him; *Hay v. Binny*, 19 Feb. 1861, 23 D. 594.

(b) *Johnston's Tr. v. His Crs.*, 1738, M. 13,407; Elch. "Trust," No. 6.

(c) Bell's Pr. § 1993-5.

CHAPTER LIV. personal advantage from the administration of the property committed to their charge.”(d) By another writer it is spoken of as “the principle which prevents the trustee from deriving personal benefit from the trust property, or doing anything to place his own interests in competition with that of the trust.”(e) The assumption, that the illegality of contracts between the trustee and the trust-estate arises from or involves the element of the trustee being *lucratus* by the transaction, has led to much misconception; and it must be got rid of before we can form a just estimate of the principle in its generality.(f) In the majority of cases it is impossible to determine whether the terms of the contract are the best attainable in relation to the interest of the trust-estate. For this reason, the Courts have uniformly refused, ever since the decision in the case of the *York Buildings Co.*,(g) to allow any question to be raised as to the fairness or unfairness of such contracts. “It is a rule of universal application,” said Lord Cranworth, “that no one having such duties to discharge shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interest of those whom he is bound to protect.” Having regard to the tenor of the opinions delivered in this leading case, as well as to the question involved in it, we think the statement of the principle might be even further generalised. Of all engagements in which the trustee (or other functionary having a delegated duty to perform) enters as an individual into stipulations with himself in his fiduciary character—it may be predicated, that he has a personal interest “conflicting, or which may conflict, with that of the trust.” Hence we deduce the more general rule, that trustees are under a disqualification from entering into any personal transaction with the trust.

Doctrine derived from the civil law.

1706. The germ of the principle is contained in the following passage from the Roman Digest:—“Tutor rem pupilli emere non potest: idemque porrigendum est ad similia; id est ad curatores, procuratores, et qui negotia aliena gerunt.”(h) In the application of the principle there is no difference between the English and Scotch systems of jurisprudence; the decisions of the Courts of either country being mutually available for illustration or authority.(i) In the investigation of the various applications of the principle, some cognate matters are necessarily touched upon which are

(d) Lewin on Trusts, 5th ed. 226.

(e) Forsyth on Trusts, p. 116.

(f) *Hamilton v. Wright*, 2 Aug. 1842, 1 Bell, 591, per Lord Brougham.

(g) *York Buildings Co. v. Mackenzie*, *infra*, § 1707; per Lord Cranworth in *Aber-*

deen Railway Co. v. Blaikie Brothers, 20 July 1854, 1 Macq. 471.

(h) Lib. 18, tit. 1, l. 34, 7; Stair, 1, 6, 17.

(i) *Aberdeen Railway Company v. Blaikie Brothers*, 1 Macq. 477, per Lord Brougham.

more fully discussed elsewhere. In this chapter we shall merely indicate the different legal relations which have been deemed sufficient to give rise to the disqualification in question. CHAPTER LIV.

1707. (1) A trustee cannot stand in the relation of a purchaser towards the trust. The rule is directed not only against the purchase of trust property by trustees, but is also understood to prohibit the acquisition of collateral rights, such as outstanding debts due to the trust,^(k) or property over which the trust holds a security.^(l) The cases are numerous, and embrace transactions between parties in almost all the recognised relations of confidence.^(m) Trustee cannot purchase trust-estate.

1708. (2) A trustee cannot contract in the character of a vendor, or put himself in the position of a creditor of the trust. Thus, a contract on the part of the trustee to supply the trust with goods is voidable as against the trustee. The Court will not interfere either to compel the beneficiary to take delivery, or to enforce payment of the stipulated price, as was found in the case of the *Aberdeen Railway Co. v. Blaikie*.⁽ⁿ⁾ This was the case of a director of a railway company contracting to supply the company with iron; the decision, however, did not turn upon the provisions of the Companies Clauses Act (which merely punishes the director by deprivation of office), but upon the common law principles enunciated above. On the same principle, if a trustee purchase a claim or security for which the trust-estate is liable, with the intention of realising the full value thereof from the trust, the intended transaction is illegal; the security is presumed to have been acquired for the benefit of the creditors, or the beneficiary under the trust, and the trustee may be obliged to assign it in consideration of the price actually paid.^(o) And so a trustee, obtaining abatements or easements in settling the liabilities of the trust, must communicate the benefit to the trust-estate.^(p) Trustee cannot contract with the trust as a vendor.

1709. (3) Trustees are not entitled to lend money to any of their number. A loan of trust-funds by trustees to a co-trustee on Trustee cannot borrow money from the trust-estate.

(k) *Mackellar v. Balmain*, 8 Mar. 1817, F.C.; *Thorburn v. Martin*, 8 July 1853, 15 D. 845.

(l) *Gillies v. MacLachlan's Rep.*, 11 Feb. 1846, 8 D. 487.

(m) See *York Buildings Co. v. Mackenzie*, 13 May 1795, 3 Pat. 378; *Jeffrey v. Aiken*, 16 June 1826, 4 Sh. 722, N. E. 728; *Elias v. Black*, 9 July 1856, 18 D. 1225; *Faulds v. Corbet*, 25 Feb. 1859, 21 D. 587. See the analysis of the English decisions in 1 Wh. & T. L. Ca., pp. 187 *et seq.* The subject is fully treated *infra*, chap. 64, sect. 3.

(n) *Aberdeen Railway Co., v. Blaikie Brothers*, 20 July 1854, 1 Macq. 461.

(o) *Maxwell v. Maxwell*, 1677, M. 16,166; *Rae v. Glass*, 1673, M. 16,170; *Ogilvie v. Lyon*, 1729, M. 16,200; *Wright v. Wright*, 1712, M. 16,198; *E. of Crawford v. Hepburn*, 1767, M. 16,208; *Hamilton v. Wright*, 8 Mar. 1839, 1 D. 668, reversed 2 Aug. 1842, 1 Bell 574.

(p) *E. of Northesk v. Carnegie*, 1702, 4 Br. Sup. 529; *Anderson v. Lauder*, 1740, Elch. "Trust," No. 10.

CHAPTER LIV. personal security, is at the personal risk of the trustees who acquiesce in the transaction ; (q) and although a loan to a trustee on first-class heritable security as a *bona fide* investment, may not seem so objectionable in principle, the transaction has been held to be illegal, and the co-trustees found not entitled to throw the loss on the estate. (r) A trustee taking the titles to securities in his own name, and not as trustee, is held to guarantee the sufficiency of such securities. (s)

Trustees cannot take a lease of the trust-estate.

1710. (4) A trustee cannot take a lease of the trust-estate. (t) And, conversely, if the trust-estate comprise leasehold property, and the trustee should obtain a renewal of the lease in his own name, he will be considered to hold it for behoof the beneficiaries. (u)

Trustee not entitled to trade with the trust-funds.

1711. (5) Trustees are not at liberty to trade with the trust-funds. Although a merchant has been appointed testamentary trustee to his partner, without being directed to withdraw his constituent's money from the business, it is his duty as trustee to do so; and if he retains the money in the concern, he will not be exonerated on paying mercantile interest as for a loan, but will be obliged, in addition, to contribute a share of the profits of the business, commensurate with the proportion which the trust-funds may bear to the whole capital embarked in the concern. (x) The trustee will also be liable *in solidum* for losses, in the event of the firm becoming bankrupt. (y) In like manner, a trustee will be bound to communicate all profits acquired by speculating with the funds of his constituent; e.g., by investments in profitable securities, (z) or by purchasing improveable property. (a)

Exercise of the right of presentation by trustees.

1712. (6) The beneficiary seems to be entitled to exercise, through the agency of the trustee, all personal rights and privileges pertaining to the trust-estate. Thus it was found in *Brown v. Johnston*, that a minor was entitled to present to a living; (b) and in

(q) *Sym v. Charles' Trs.*, 13 May 1830, 8 Sh. 741; *Grieve v. Amos' Exrs.*, 24 June 1835, 13 Sh. 973. As to loans on heritable security, see *Acc. of Court v. Forsyth*, 28 Jan. 1853, 15 D. 345; *Murray v. Murray*, 30 May 1833, 11 Sh. 663; *Graham v. Hunter's Trs.*, 4 Mar. 1831, 9 Sh. 543; *Thomson v. Christie*, 16 June 1852, 1 Macq. 236.

(r) *Perston v. Perston's Trs.*, 9 Jan. 1863, 1 Macph. 245. *Idem* in the case of magistrates, who were official trustees, lending trust-money to the corporation; *Baird v. Mags. of Dundee*, 18 Nov. 1865, 4 Macph. 69.

(s) *Murray v. Borthwick's Trs.*, 1797, M. 8287.

(t) *Ex parte Hughes*, 6 Ves. 617; *Attorney-Gen. v. E. of Clarendon*, 17 Ves. 500.

(u) *Wilsons v. Wilson*, 1789, M. 16,376; *Bee v. Wallace's Exrs.*, 1745, M. 6008, 6011; *Parkhill v. Chalmers*, 1771, M. 16,365, affirmed 12 Feb. 1773, 2 Pat. 291. See *Keech v. Sandford*, Sel. Ch. C. 61; 1 Wh. & T. Leading Ca. 3d ed. 39.

(x) *Cochrane v. Black*, 1 Feb. 1855, 17 D. 321; 16 July 1857, 19 D. 1019; *Laird v. Laird*, 26 June 1855, 17 D. 984.

(y) *Graham v. Keble*, 10 Nov. 1813, 2 Dow, 17; 21 July 1820, 6 Pat. 616.

(z) *Torrie v. Munsie*, 31 May 1832, 10 Sh. 597.

(a) *Gillies v. Maclachlan*, 11 Feb. 1846, 8 D. 487.

(b) *Brown v. Johnston*, 9 June 1830, 8 Sh. 902.

two previous cases the right of a minor to present, though a commissioner, was recognised.(c) And in *Grindlay v. Drysdale*, the Court, on the report of Lord Moncreiff, ruled that the reverser and not the adjudger should present, during the currency of the legal, on the ground that the possession of the latter must be such as would go to diminish the debt.(d) “Although the right of presenting,” said Lord Moncreiff, “cannot be valued in money, the very fact that the title is *in commercio*, and still more the plain sense of the thing, show that one act of presentation may really be of more value to the creditor than all his debt. He may thereby provide for a son or other friend who would otherwise be dependent on him. In this way he would get double payment for his debt.” The right of presentation is undoubtedly a valuable, though not a saleable privilege; and although, in the case of a regular trust the right to present would vest in the trustee, he would most probably be held bound, as in England, to adopt the nomination of the beneficiary.(e)

1713. On the same principle, it is clear that the trustee cannot appropriate the privilege of shooting on the trust-estate.(f) In *Condie v. Macdonald*, it is true, the Court refused to hold a factor personally liable for the value of unlet shootings.(g) But it has since been determined that the value of unlet shootings must be taken into account in estimating the total rental over which heirs of entail may grant security for family provisions in virtue of reserved powers, or under the enabling clauses of the various Acts of Parliament.(h) In the case of *Menzies v. Menzies*, Lord Rutherford observed that the law holds that such rights are not personal privileges only, but valuable accessories to the estate; and “that what may be let, and under ordinary administration is often let, shall, if unlet, be estimated by its value.”(i) The principle, that the valuable nature of the subject is the criterion of interest, has also been acknowledged by the Legislature in Acts relating to taxation. Having regard to usage and to these sources of authority, while it would be too much to say that trustees are bound in every instance to let the entire shootings, even where the trust-estate is of great value, we apprehend it would be their duty to let them in all cases where they were not reserved for the use of the beneficiary.

Privilege of shooting held to be a part of the trust-estate.

(c) *Baillie v. Morrison*, 28 Feb. 1822, 1 Sh. 363, N. E. 840; *Presby. of Inverness v. Fraser*, 10 June 1823, 2 Sh. 384, N. E. 841.

(d) *Grindlay v. Drysdale*, 4 July 1833, 11 Sh. 896.

(e) See Lewin on Trusts, 5th ed. 226.

(f) See English cases of *Webb v. F. of Shaftesbury*, 7 Ves. 488; and *Hutchinson v. Morrit*, 3 Y. & C. 547.

(g) *Condie v. Macdonald*, 20 Nov. 1834, 18 Sh. 61, see 65, note.

(h) *Menzies v. Menzies*, 10 March 1852, 14 D. 651; as to shootings actually let, see *M'Pherson v. M'Pherson*, 1 D. 795, affirmed 13 Aug. 1846, 5 Bell, 280; *Sinclair v. Lord Duffus*, 24 Nov. 1842, 5 D. 174.

(i) 14 D. 664.

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Trustee not
entitled to
remuneration for
professional
services.

1714. (7) Where a person nominated as a trustee has declined the appointment. He will not be appointed judicial factor on the trust-estate.^(k) Were the practice otherwise, it would operate as an indirect encouragement to trustees to convert their office into a source of profit. In one case, where a trustee was willing to act, but doubts had been suggested by other parties as to the validity of the trust in consequence of the truster having been sentenced to transportation, the Court appointed the trustee judicial factor;^(l) but in a later case, where an ex-trustee was objected to, the Court conferred the factory upon a neutral person.^(m) In the exceptional case of a trustee being appointed judicial factor, it may be doubted whether he would be entitled to a commission for his services. The practice in similar cases is adverse to such a claim; e.g., where a person qualified to serve as tutor-at-law is made *curator bonis*⁽ⁿ⁾ or factor *loco tutoris*,^(o) the Court attaches the condition that he must act gratuitously.

1715. (8) The office of a trustee is essentially gratuitous, and therefore a trustee who acts as agent to the trust is not entitled to charge, by himself or his partner,^(p) for his professional labours, though he may recover "costs out of pocket."^(q) This principle, which was laid down absolutely in the earlier English decisions,^(r) and in the Scotch cases of *Morrison v. Rennie* and *Flowerdew*,^(s) was supposed to have been shaken by Lord Cottenham's ruling in *Craddock v. Pyper*.^(t) But the authority of that case was denied by Lords Cranworth and Brougham in *Manson v. Baillie*.^(u) The question was afterwards argued before all the judges in the Court of Session, and determined as stated above.^(x) The rule is now understood to extend to all offices of trust, including that of Parliamentary trustee,^(y) trustee for creditors,^(z) judicial factor, and *curator bonis*.^(a)

(k) *Pennycook*, Petr., 20 Dec. 1851, 14 D. 811.

(l) *Marshall v. Anderson*, 5 June 1841, 8 D. 989.

(m) *M'Culloch v. Forman*, 11 Dec. 1851, 14 D. 811.

(n) *Jackson v. Wight*, 19 June 1835, 13 Sh. 961.

(o) *Pet. Robertson*, 14 Jan. 1830, 8 Sh. 485.

(p) *Lord Gray v. Dundas*, and *Broughton v. Broughton*, *infra*.

(q) The trustee is entitled to interest on his outlay, calculated from the end of each professional year for the costs of that year; *Bremner v. Mabon*, 18 Dec 1837, 16 Sh. 218; *Napier v. Balfour*, 2 June 1835, 13 Sh. 858.

(r) *Robinson v. Pett*, 3 P. Wms. 249; *New v. Jones*, cited, 9 Jarm. Prec. 838.

(s) *Morrison v. Rennie*, 14 July 1847, 9 D. 1483, as reversed 26 April 1849, 6 Bell 422; *Flowerdew's Trs.*, Petr., 22 Dec. 1854, 17 D. 263.

(t) *Craddock v. Pyper*, 1 Macn. & Gor. 664.

(u) *Manson v. Baillie*, 19 June 1855, 2 Macq. 80, 91; see *Broughton v. Broughton*, 5 De Gex. Macn. & G. 160.

(x) *Lord Gray v. Dundas*, 21 June 1856, 19 D. 1.

(y) *Lord Gray v. Dundas*, *supra*.

(z) *Lauder v. Miller*, 15 July 1859, 21 D. 1358; and *Johnston's Cr. v. Johnston's Tr.*, 4 Jan. 1738, reprinted 21 D. 1383.

(a) *Kennedy v. Rutherglen*, 25 Jan. 1860, 22 D. 567; and cases of *Baillie v. Mackenzie*

1716. It would seem that a trustee is entitled to act as professional adviser, and to charge for professional assistance rendered to the trust or to the beneficiary, if he is specially employed by the beneficiary (b) or by the truster.(c) And where a deed gave power to the trustees "to appoint agents and factors, either of their own number or other fit persons," it was held, Lord Deas dissenting, that the intention to allow remuneration must be presumed.(d) "When a party," said Lord President M'Neill, "authorises the employment by his trustees of one of their own number in one or other of these offices; and does so in the same sentence with which he authorises the employment of any other person, I have no doubt that he must mean employment in the ordinary sense and signification of that term, in the ordinary way in which persons possessing that character are employed; and that being so, I am clearly of opinion that in this case it is competent to the trustees to employ one of their own number, with remuneration." And to the same effect Lord Ivory observed, "It was not necessary, if the factor was to exercise his functions gratuitously, that any power should have been given in the deed to the trustees to appoint any of their own number to the office. It has all along been competent to do so, if the office is to be exercised gratuitously."(e)

Secus, if specially employed by the truster or by the beneficiary.

1717. There is a specialty in the case of a tutor or curator *ad litem*. The very object of such appointments being to secure the services of a professional person competent to attend to the interests of the ward in a particular suit, there is no reason why he should not be remunerated for his services;(f) but it is not in accordance with sound practice for a tutor *ad litem*, who is a law agent, to conduct the case of his ward personally, or by a firm in which he is a partner.(g)

Tutor *ad litem* entitled to honorary or professional remuneration.

1718. (9) The principle of *Home v. Pringle* must be held to prohibit trustees from accepting any salaried or remunerative appointment under the trust, whether as factor, cashier, or otherwise.(h) The altered standard of opinions in our own time makes

Trustee cannot hold salaried office under the trust.

and *Douglas*, Pets. 21 June 1856, 19 D. 1. The rule does not apply in any circumstances to the remuneration of judicial factors by commission; *Acc. of Court v. Watt*, 2 June 1866, 4 Macph. 772.

(b) *Handyside's Trs. v. Scott*, 24 Jan. 1868; *Hope v. Hope*, 12 Feb. 1856, 18 D. 585; *Dixon v. Rutherford*, 11 Nov. 1863, 2 Macph. 61.

(c) See *Lord Gray*, Petr., 19 D. 22, per Lord Neaves; *Manson v. Baillie*, 2 Macq. 86, per Lord Cranworth.

(d) *Goodsir v. Carruthers*, 19 June 1858 20 D. 1141.

(e) 20 D. 1148. On the subject generally, see chap. 75, sect. 1.

(f) *Pet. Rennie*, 27 June 1849, 11 D. 1201; *Pirrie v. Collie*, 4 Mar. 1851, 13 D. 841.

(g) See *Johnstone v. Beattie*, 29 Jan. 1856, 18 D. 843.

(h) *Home v. Pringle*, 22 June 1841, 2 Rob. 384; in this case the House would not interfere, as the accounts had been

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Gratifications to trustees.

Trustee has no resulting interest in the trust-estate.

it unnecessary to advert particularly to those cases in which agreements for the payment to trustees of a direct bribe, or "gratification," for mismanaging the trust property, were disallowed.(i)

1719. Lastly, there is a legal presumption that no beneficial interest is intended to accrue to trustees; and accordingly, it is a general rule that a trustee has no resulting or reversionary right in the subjects conveyed to him, in the event of the failure of the persons beneficially instituted, or of the purposes towards which the trust-funds are to be applied.(k)

SECTION II.

OFFICE OF TRUSTEE IS JOINT, AND TRANSMITS TO SURVIVORS.

1720. Under the usual style of destination by which trust property is conveyed to the trustees, and to the acceptors or acceptor, survivors or survivor of them, questions relating to the title of administration are avoided, the office being declared joint both as to acceptance and survivance. But as trust-deeds are occasionally met with in which other forms of destination have been adopted, it is necessary to consider the import of such destinations, with reference to the title and powers of the trustees.

Different forms of nomination.

1721. I. DESTINATION TO ACCEPTORS IN WHAT CASES IMPLIED.—The first topic of inquiry is that of the legal effect of a nomination of a plurality of trustees, where some of the trustees accept, and others do not. The consequences of a partial acceptance will, of course, depend on the terms of the nomination. The known modes of nominating a plurality of trustees may all be reduced to one or other of the following cases:—(1) Simple nomination; (2) simple nomination with the proviso of a quorum; (3) nomination of A., B., and C., and acceptors, with the proviso of a quorum; (4) nomination of A., B., and C., when A. is declared a *sine qua non*; (5) nomination of A., B., and C., and acceptors, A. being a *sine qua non*; (6) nomination of A., B., and C., "jointly." The effect of provisions for continuing the trust to survivors is afterwards considered.

Simple nomination equivalent to joint and several.

1722. (1) and (2) When a truster nominates a plurality of persons as his trustees, without declaring whether the appointment is a joint or a several one, the nomination is said to be simple. It has been doubted whether such an appointment does not fall, in the event of any of the trustees declining to accept; but the weight

settled; but see *Wellwood's Trs. v. Hill*, 17 Dec. 1856, 19 D. 187.

(i) See *Mor. voce* "Pactum Illicitum," p. 9455 *et seq.*

(k) Chapter 48, section 1 (Resulting Trusts).

of authority is certainly in favour of the doctrine that a simple nomination implies a destination to "acceptors." If so, then the acceptance of a single trustee ought to be sufficient; since the appointment must be construed either as a joint, or as a several one. A simple nomination of tutors vests the office in the acceptors or acceptor. (l)

1723. The opinion of Lord Stair would seem to point to a distinction between trusts *inter vivos* and trusts *mortis causa* which is scarcely reconcilable with principle. After stating the general rule, that mandatories must concur in the execution of a joint-mandate, he says:—"It may be objected, that where there are many executors or tutors, without mention of a quorum, the death of one makes not the nomination to cease, nor the death or non-acceptance of some of them; and therefore, this being the most important trust, the like must hold in all other cases. It is answered, that the parity holds not; for the deeds of defuncts in their latter wills are always extended, that the act may stand; but in contracts it is contrary, where words are interpreted more strictly; and, in this case, the difference is clear, that a mandate *inter vivos* giving power, it is strictly to be interpreted, because, the power failing, returns from the mandator to the mandant himself; but a power given by a defunct in contemplation of death cannot return, and therefore the defunct is presumed to prefer all the persons nominate to any other that may fall by course of law." (m) Bell, whose opinion was probably influenced by English analogies, held the presumption to be, in the case of indefinite appointments, that the trustees are intended to act jointly, and that the confidence of the truster is reposed in them only while they continue together. (n) But, according to Bell, the consequences are precisely the same, whether the failure arises from death or from non-acceptance. Mr Forsyth's opinion appears to be, that where any limitation of the number of the trustee is expressed—as, for example, by adjecting a destination to survivors, or by limiting a quorum—the presumption for a joint appointment is taken away, and the alternative is presumed, namely, that of a joint and several appointment, under which the trust subsists if a single trustee should accept.

1724. This view is supported by the case of *Halley v. Gowans*, where a trust-disposition for behoof of creditors was granted to six persons named, "and the survivors or survivor of them, declaring

Opinions of
Stair, Bell, and
Forsyth.

*Halley v.
Gowans.*

(l) Stair, 1, 6, 14; Ersk. 1, 7, 30; 2 Fraser on Parent and Child, 176, and cases there cited.

(m) Stair, 1, 12, 13.

(n) Bell's Pr. § 1993; Com. 6th ed. 847. The passage referred to is not in the last quarto edition.

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any two of them a quorum, as trustees," and a reduction of the trust was brought, on the ground that only three trustees had accepted. The Court found—"That the said trust-disposition did not fall or lapse by the non-acceptance of a part of the trustees, but that the act and deeds of a *quorum* of those who accepted and acted were valid in the ordinary administration of the trust, if not challengeable on the ground of *mala fides*, malversation, or on any other ground that would have been relevant against the whole dispositive named, if they had accepted." (o) In this case it will be seen that the Court disregarded Lord Stair's distinction as between testamentary trusts and mandates *inter vivos*. The provision of a quorum was considered important, as showing that the makers of the deed did not contemplate having the concurrence of all the trustees; but the judges also discountenanced the notion that a simple nomination necessitated the acceptance of the whole body of trustees. Thus, Lord Cunninghame (Ordinary) says in his note (p)—"When a party in Scotland has it in view to constitute a trust, such as the pursuers allege that they meant the present to be, it is incumbent on him either to make any favoured nominee, in whom he places any peculiar reliance, a *sine qua non*, or so to constitute his trust as to give the nominees the power only of acting jointly. See the cases of *Drummond*, *Ellis*, and *Huntly*." (q) But the right of the accepting trustees is still more clear when a quorum is specified in the trust-deed. The acceptance of that quorum has always been held sufficient to preserve the trust. See the case of *Ramsay*, (r) and of *Campbell v. Lord Monzie*, (s) in both of which it was assumed that the nomination of a quorum would have preserved the trust." Lord Gillies said it was the doctrine of law and of common sense, that where a quorum of trustees is named, and that quorum accepts and acts, the trust cannot be held to have lapsed by non-acceptance. And Lord Mackenzie said it was impossible to believe it to have been the intention of the parties to the trust, that if any one of the nominees should not accept, the whole was to fall and become abortive. The cases cited by Lord Cuninghame relate to the appointment of tutors; and if that analogy may be relied on, there can be no doubt that a simple nomination implies a several, and not a joint appointment.

Opinion of Lord
Ivory.

1725. To the same effect, we have the opinion of Lord Ivory. A mandate, he says, "will generally fall by the death of any one.

(o) *Halley v. Gowans*, 20 Feb. 1840, 2 14,695; *Marquis of Montrose v. Tutors*, D. 628. 1688, M. 14,697.

(p) 2 D. 629.

(r) *Ramsay v. Maxwell*, 1672, M. 14,695.

(q) *Drummond v. Feuars of Bothkennel*, 1671, M. 14,694; *Ellis v. Scot*, 1672, M. 14,708.

(s) *Campbell v. Lord Monzie*, 1752, M.

But this rule holds only in mandates *inter vivos*; for in the appointment of tutors and curators, of managers of a mortification, or of any other testamentary trustees, unless the administration be expressly declared to be *joint*, the right to act does not fall by the death or non-acceptance of one or more of the indefinite number.”(t) The cases of *Findlay* (u) and *Gordon’s Trs. v. Eglinton*, (x) deciding that a simple nomination implies the right of survivorship, have an important bearing on this question: first, because survivorship is inconsistent with the supposition of a *joint* nomination; and secondly, on account of the principle of the decisions, which is founded on the presumed will of the deceased, agreeably to the doctrine enunciated in the concluding words of our quotation from Lord Stair, (y) and which is generally applicable to all cases of failure of trustees, whether by death or non-acceptance.

1726. In a subsequent case, an application was made to the Second Division of the Court to appoint a judicial factor, on the ground that the trust had fallen by the non-acceptance of one of two trustees. The destination was to A. and B., and the survivor of them, and to persons assumed to act along with, or in succession to them. The application was opposed by the accepting trustee, and the Court gave no opinion on the merits, but superseded consideration of the petition, to allow the petitioners to bring a declarator that the trust had fallen.(z)

1727. The law of England, which gives less latitude than our own to individual action among trustees (e.g., requiring the concurrence of every accepting trustee to all acts of administration), acknowledges the right of the continuing trustee to administer the trust alone where the other trustees have disclaimed or resigned. The settlor, it is said, must be presumed to know what would be the legal consequences of the death or disclaimer of some of the trustees. And where a disclaimer is executed, it operates retrospectively, and makes the other trustee the sole trustee *ab initio*.(a) The result of the authorities, English and Scotch, seems to be that a simple nomination will be effectual though only one trustee accept; but that where a quorum is mentioned, the nomination will fail, unless a quorum of the persons appointed trustees are willing to accept. Where a definite number is required to form a quorum, it is obviously impossible to continue the trust unless that number accept and survive.(b)

Doctrine of the law of England in relation to joint appointments.

(t) Iv. Ersk. 662, nota.

(x) *Seton v. Seton*, 28 Nov. 1855, 18 D.

(u) *Findlay*, Petr., 29 June 1855, 17 D. 117.

(a) Lewin on Trusts, 5th ed. p. 165.

(x) *Gordon’s Trs. v. Eglinton*, 17 July 1851, 13 D. 1381.

(b) *Ireland v. Glass*, 18 May 1833, 11 Sh. 626.

(y) Stair, 1, 12, 13.

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Provision of a quorum does not affect the title of sole accepting trustee.

Effect of appointment of a *sine qua non*.

Whether the declinature of the *sine qua non* causes a lapse.

Effect of appointment of trustees to act "jointly."

1728. (3) Under a nomination in favour of A., B., and C., and the acceptors or acceptor of them, it is immaterial, as regards the subsistence of the trust, whether a quorum is appointed or not. The trust will subsist if a single trustee accept; the provision as to a quorum necessarily becoming inoperative when the number of the trustees is less than three.

1729. (4) and (5) One or more persons may be selected out of a plurality of trustees, without whose consent no act of administration shall be effectual. Such a person is accordingly called a *sine qua non*. The utility of making an arrangement of this nature may be doubted. The practical effect of it is the same as that of a joint appointment of two,—a most inconvenient arrangement, because the collective vote of the majority of the trustees is neutralised by the single vote of the *sine qua non*; and because, in the event of differences of opinion arising between the *sine qua non* and the other trustees, the business of the trust cannot be performed. At present, however, we are dealing only with the effect of a partial acceptance under such an appointment. It has been said,^(c) on the authority of an old decision,^(d) that the appointment falls if all the trustees-nominate disclaim, except the *sine qua non*. It has also been supposed that the disclaimer of the *sine qua non* nullifies the appointment, although the other trustees-nominate should be willing to act.^(e) We do not think we are required to admit either of these propositions. The more correct view appears to be, that the right of veto is a personal privilege conferred on the trustee in the case of his acceptance; whence it follows that, if he decline, the trust may be administered by a quorum of the other trustees in the ordinary way.^(f) This is in conformity with the cases in relation to tutory, e.g., *Scott v. Scott*,^(g) *Drummore v. Somervil*,^(h) *Sinclair v. Sutherland*.⁽ⁱ⁾ This construction applies even more obviously where the appointment is expressly limited to the acceptors or acceptor of the trustees.^(k)

1730. (6) Where the trust is committed to two or more trustees "jointly," all must accept, survive, act, and concur, in order to fulfil the trust, each individual being in effect a *sine qua non*.^(l)

(c) Fraser on Parent and Child, 178.

(d) *Primrose v. E. of Rosebery*, 1715, M. 16,835; see also *Blair v. Ramsay*, 1735, M. 14,702, 5 Sup. 688.

(e) Pet. *Kinnaird*, 1680, 8 Br. Sup. 343; *Ramsay v. Maxwell*, 1672, M. 14,695, 2 Sup. 617; *Marquis of Montrose v. His Tutors*, 1698, M. 14,697; *Johnston v. Crawford*, 1751, Elch. "Tutor," No. 28. These cases all relate to tutory.

(f) *Forbes v. Earl of Galloway's Trs.*, 2 Feb. 1808, F.C., affirmed 31 May 1808, 5 Pat. 226.

(g) *Scott v. Scott*, 1775, M. 16,371, 5 Br. Sup. 683.

(h) *Drummore v. Somervil*, 1742, M. 14,703.

(i) *Sinclair v. Sutherland*, 1777, 5 Br. Sup. 634, Hailes, 752.

(k) *Forbes v. Galloway's Trs.*, *supra*.

(l) Stair, 1, 12, 13; Ersk. 3, 3, 34.

But to warrant so strict an interpretation, the appointment must be expressly stated to be joint; or, as it is very distinctly put in a case of tutory reported by Kilkerran,—“Where A. and B. are appointed tutors, without expressing them to be joint tutors, though one of them should not accept the office, it would subsist with the other; for to make a joint nomination, it must be expressed that they are to be joint tutors.”(*m*) In practice, it is unusual to make joint appointments of trustees.

1731. II. DESTINATION TO SURVIVORS IN WHAT CASES IMPLIED.—A simple destination to trustees vests the estate and office in the accepting trustees *jointly*, so that the right accrues to survivors. The doctrine of accrescion, derived from the civil law, assumes that the granter of a disposition in favour of a plurality of persons indicates an intention that the estate should go to any one of them rather than to a person not named in the disposition.(*n*) This presumption applies with peculiar significance to the case of a joint nomination or conveyance in trust; and accordingly, a distinction has always been taken between destinations in trusts, and joint mandates, which expire on the death of the mandant. In the case of a joint appointment of tutors-nominate, Stair lays it down that the office survives ;(*o*) and accordingly, where the office of tutors and curators was conferred upon two persons, whom failing, upon certain others, it was held that the substitution did not take effect by the death of one of the persons nominated in the first instance.(*p*) Erskine expressly states, that the office continues in the person of the last survivor, adding, “For though, in deeds *inter vivos*—e.g., mandates—where two or more mandatories are named in general terms, they are understood to be named jointly, yet the favour of last wills, and of minority, creates a presumption that the father or minor prefers any one of the tutors or curators so named to those who are pointed out by the law.”(*q*) From this passage we infer that a disposition in trust to “A. and B. *jointly*” would, according to Erskine’s view of the term, exclude the right of survivorship, contrary to the rule of construction which has hitherto obtained in the interpretation of beneficial dispositions.

1732. The doctrine of accrescion in joint appointments of trustees being rested entirely on a consideration of *delectus personæ* on the part of the testator, it will not avail to keep alive an appoint-
Survivorship is not implied in appointments of tutors.

(*m*) *Young v. Watson*, 1740, M. 16,846; Bell’s Pr. § 1993–5; *Stoddart v. Rutherford*, 30 June 1812, F.C.

(*n*) Pothier, ed. Dupin, tom. 7, p. 892. See Stair, 3, 8, 59 and 79; *Wright’s Exrs. v. Robertson*, 27 Jur. 341.

(*o*) Stair, 1, 6, 14.

(*p*) *Fisher’s Children v. Their Tutors and Curators*, 1758, M. 16,861.

(*q*) Ersk. 1, 7, 30.

CHAPTER LIV. ment of *tutors-dative* after the death of one of their number.^(r) This principle may now be considered as fixed by the decision of the House of Lords in *Scot's* case, overruling an almost unanimous judgment of the Court of Session. Now that the appointment of tutors-dative is vested in the Court of Session (by 19 & 20 Vict., cap. 56, § 19), under the same forms of procedure as are applicable to other appointments under the Pupils Protection Act, it may fairly be assumed, that the rule thus laid down in reference to joint tutors will extend to joint appointments made by virtue of the *nobile officium* of the Court of Session. A similar rule is recognised in practice in England; testamentary guardianship there continuing in the person of the survivors;^(s) whereas, if the appointment emanates from the Court of Chancery, the office is determined by the death of any of the guardians.^(t)

Survivorship implied in conveyances to a plurality of persons as trustees.
Gordon's Trs. v. Eglinton.

1733. The question as to the implication of survivorship in trust-destinations was considered by the Second Division of the Court, in the case of *Gordon's Trustees v. Eglinton*.^(u) A trust-disposition and settlement conveying property to certain trustees, and to the survivors or survivor of them, was afterwards altered by a codicil, wherein certain other persons were nominated trustees, without any provision respecting survivance. The trustees made up a title by disposition from the heir-at-law in favour of themselves as trustees, and their heirs and assignees. It was held that the destination in the codicil and, *a fortiori*, the destination in the conveyance by the heir-at-law, must be construed with reference to the original deed; and therefore, that the original destination in favour of surviving trustees must be held as implied in subsequent transmissions. Hence the surviving trustee was *in titulo* to sell the estate and to grant a valid disposition. Lord Justice-Clerk Hope expressed a very decided opinion in favour of the existence of the right of survivorship in destinations to trustees. "On a more general ground," he said, "I apprehend it to be quite clear that a conveyance to trustees, whether in the truster's own grant in a *mortis causa* deed, or in any conveyance in fulfilment of his deed, is a grant, when it is not otherwise expressed, to the trustees, whatever may be their number, and does not fall by the death of one of them. It is said some doubts have recently been thrown on this point. Such doubts are quite unsound, and against the first principle on which such trusts are construed. The true principle is

^(r) *Scot v. Stewart*, 7 April 1884, 7 W. & S. 211, reversing 7 Sh. 380.

^(s) *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 102.

^(t) *Bradshaw v. Bradshaw*, 1 Russ. 528; *Hall v. Jones*, 2 Sim. 41.

^(u) *Gordon's Trs. v. Eglinton*, 17 July 1851, 18 D. 1381.

stated by Stair, and admits of no doubt. So long as one of the trustees is alive the trust subsists, and the powers can be competently exercised by that trustee." Lord Cockburn thought this question "not free from doubt." (x)

1734. In the subsequent case of *Findlay*, an application by a surviving trustee for the appointment of a factor, on the ground that the appointment was a joint one, and did not contain a destination to survivors, was refused by the First Division; the Lord President (Lord Colonsay) observing, "I think that in a testamentary deed, in which trustees are appointed, the condition of survivorship is implied, on the principle that a truster prefers that any one of the trustees nominated should manage the estate rather than a judicial factor." (y) In England, where the law of survivorship in trusts has been long established, the same explanation has been given of the principle, and the Courts of Equity have discountenanced all attempts to abridge the generality of its application. (z) Accordingly, the deeds of a surviving trustee will be upheld, notwithstanding that the trust is of a discretionary nature, and that a power of appointing new trustees has not been exercised; and even where the surviving trustee is a married woman. (a)

Import of the recent authorities.

1735. In practice, it has been usual in Scotland to exclude any question as to survivorship, by extending the destination in the trust-deed to the survivors or survivor of the accepting trustees; and where a quorum is appointed, it is provided as a general rule, and one that it is desirable to observe, that the major number surviving and accepting from time to time shall form a quorum. Where the destination is not so expressed—e.g., where the trust-deed simply declares that a majority of the *accepting* trustees shall be a quorum—it may be asked whether a majority of the survivors of the accepting trustees would be sufficient? We think it would; on the ground that the nomination is not joint; and that upon the

Provision of survivorship includes the survivors of the accepting trustees.

(x) 13 D. 1385.

(y) *Pet. Findlay & Ors.*, 30 June 1855, 17 D. 1014. Since the publication of the first edition of this work, it has been laid down in the Second Division of the Court, in the case of *Dawson v. Stirton*, 4 Dec. 1813, 2 Macph. 196, that in a simple nomination of trustees the right of survivorship was not implied; but the prior authorities do not appear to have been cited to the Court. The question was again raised in *Miles v. The North British Ry. Co.*, 16 Feb. 1857, 5 Macph. 402, but in the view taken by the Court, it was not necessary to decide the point.

(z) *Per* Vice-Chancellor Wood in *Lane v. Debenham*, 11 Hare, 188. "If I were to lay down such a rule," he observed, "it would come to this,—that wherever an estate was vested in two or more trustees to raise a sum by sale or mortgage, you must come to the Court on the death of one of the trustees." And the survivor may sue the solicitor to the trust for an accounting, without making the representative of the deceased trustee a party; *Slater v. Wheeler*, 9 Sim. 156.

(a) Lewin on Trusts, 5th ed. p. 212.

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death or resignation of a trustee he ceases to be an accepting trustee, because he is no longer a trustee at all.(b)

Practical
suggestions.

1736. We may add, that where the authority of acting trustees rests on the implied condition of survivorship, it is desirable, if possible, to obtain the consent of the whole of the surviving trustees to all important acts of administration, and especially where their number has been reduced below that of a quorum of the original trustees-nominate. In the event, therefore, of a trustee refusing, in such circumstances, to concur with his colleagues in necessary acts of administration, they may find it necessary for their own security to raise an action to compel him to perform his duty, as was done in the case of *Lynedoch v. Ouchterlony*.(c)

Implication of
survivorship in
appointments of
executors.

1737. It would seem that the office of executor also enures to survivors. In the ordinary case, of a simple or several appointment of executors-nominate, this proposition is merely a particular case of survivance amongst testamentary trustees, executors-nominate being in the strictest sense trustees.(d) It would be more correct to say that the doctrine has been extended from the case of executors to trustees generally; for Lord Stair affirmed, both on principle and authority, that the office of executry descends to survivors. Distinguishing between the case of a joint authority and a nomination of executors or tutors, without mention of a quorum, he says, "A mandate *inter vivos*, as giving power, is strictly to be interpreted, because the power failing, it returns from the mandator to the mandant himself; but a power given by a defunct in contemplation of death cannot return; and therefore, the defunct is presumed to prefer all the persons nominate to any other that may fall by course of law."(e)

Whether the
principle ex-
tends to the case
of executors-
dative.

1738. The reasons given for Lord Stair's opinion, and for the judgment in *Findlay's* case, quoted above, are inapplicable to the case of executors-dative; and the decision of the House of Lords, refusing to extend the principle of survivorship to tutors-dative, may be supposed to throw some doubt on the title of surviving executors-dative. The latest authorities, however, recognise the right of survivorship in the case of executors-dative, and, as we think, with good reason.(f) Tutors-dative, it may be observed, not only derive no authority from the will of the testator, but they have not even a vested interest in the property which they manage; whereas

(b) But see *Blisset's Trs. v. Hope's Trs.*, 7 Feb. 1854, 16 D. 482, and cases cited below, as to powers of a majority or quorum.

(c) *Lynedoch v. Ouchterlony*, 20 Nov. 1832, 11 Sh. 60; see also *Adie v. Mitchell*, 19 Dec. 1835. 14 Sh. 185.

(d) Bell's Prin. § 1899.

(e) Stair, 1, 12, 13; 3, 8, 59 and 79.

(f) *Anderson v. Kerr*, 15 Nov. 1866, 5 Macph. 82, and see *Bones v. Morrison*, 21 Dec. 1866, 5 Macph. 240.

executors-dative may be the actual proprietors—burdened by the trust—of the deceased person's estate, and must continue in possession until divested of the fee by one or other of the known forms of transmission. The distinction pointed at has been recognised in the law of England, according to which the right of executorship and administratorship survives, as being an authority coupled with an interest; while the committees of a lunatic's estate, who have but a limited authority, retain the office only during their joint lives.^(g) Such being the law of England and Ireland, the results of establishing an opposite doctrine in Scotland would be anomalous and inconvenient. The effect of the Confirmation of Executors Act 1858, is to amalgamate the offices of executor and administrator in the different parts of the United Kingdom, and to facilitate the administration of the entire personalty as one estate. With this object, it has been provided that a confirmation, registered in the Court of Probate, shall have the like force and effect as if probate or letters of administration had been granted; from which it would follow, that if the decree of confirmation were to become inoperative in Scotland—by reason of the death of one of the executors—it must still subsist as a title to the surviving executor in England and Ireland, although utterly nugatory within the jurisdiction in which it was granted. Another reason for believing that the office of executor-dative survives is, that the surviving executor must still be preferable, according to the rules of succession, to all other competitors. We may add, that in many cases there would be room for the plea of *delectus personæ*, as, for instance, where confirmation has been obtained by legatees or trust-disponees not expressly nominated executors.^(h)

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SECTION III.

TRUSTEES ACT BY A MAJORITY.

1739. An indefinite nomination of trustees is qualified by the implied condition that the resolution of the majority binds the whole body in matters of ordinary administration. By the 1st section of the Trustee Act 1861 it is enacted, that all trusts constituted by virtue of any deed or local Act of Parliament under

Power of trustees to act by a quorum by the Trustee Act and at common law.

^(g) Lewin on Trusts, 5th ed. p. 212; *Hudson v. Hudson*, Rep. t. Talb. 129.

^(h) On the cognate question whether the title to estate vested in *ex officio* trustees is continued in the person of their successors in office, reference is made to the cases of *Black v. Lorimer*, 25 June

1822, 1 Sh. 521, N. E. 481 (referred to in Juridical Styles, Signet Letters, *voce* Declaratory Adjudication); *Campbell v. Orphan Hospital*, 28 June 1843, 5 D. 1273; and *Gardner v. Trinity House of Leith*, 23 Jan. 1845, 7 D. 286.

CHAPTER LIV. which gratuitous trustees are nominated, shall be held, unless the contrary be expressed, to include a provision that the majority of the trustees accepting and surviving shall be a quorum.⁽ⁱ⁾ As regards the right of trustees to act by a majority, the Statute appears to be merely declaratory of the common law rule of administration.

Whether at
common law
executors may
act by a quorum.

1740. The earlier authorities are not very definite, nor quite consistent. Lord Stair affirms that co-executors cannot pursue unless “concurring or called;” adding, however, that “if any of the executors confirmed will not concur and contribute equal pains and expense, the pursuit will be sustained without him.”^(k) In an early case, where the testator “settles the remainder of her goods, etc., upon her executors after-named, to be applied and disposed of in such manner as the survivors or survivor of them shall think fit, and nominates A., B., and C., executors of this her last will and testament,” action was sustained at the instance of a majority of the executors;^(l) and it had been previously held that one executor could not do diligence on a bond “except all the rest should either concur in the pursuit or else should refuse to assist, and that they were excluded from their office.”^(m) Erskine lays down the principle that executors hold office *pro indiviso*;⁽ⁿ⁾ but in the chapter on Mandatories he says that the rule “ought not to be rigorously extended to steps taken by a lesser number in points consisting merely in form, or to such acts as are a necessary consequence of what had been before resolved at a full meeting.”^(o)

In the case of
executors-nominate and trustees, a majority is a quorum at common law.

1741. It is not therefore quite clear whether our law, as now administered, recognises any difference between trustees and executors as regards the right of acting by a majority. In the case of trustees who are also executors, there is no doubt as to the common law right of the majority to execute the trust. Accordingly, where three gentlemen were made trustees for appointing to a bursary, and an appointment was made by two of their number, the Court held, “That the nomination being indefinite, the majority were entitled to act in the necessary absence of the other examiner.”^(p) And in the more recent cases of *M'Culloch v. Wallace*,^(q) and *Blisset's Trustees v. Hope's Trustees*,^(r) the Court unanimously found that a majority of accepting trustees had a title to pursue actions on be-

⁽ⁱ⁾ 24 & 25 Vict., cap. 84, § 1; explained by 26 & 27 Vict., cap. 115; see *Reid, Petr.*, 20 March 1863, 1 Macph. 774.

^(k) Stair, 3, 8, 59.

^(l) *Grant v. Campbell's Reps.*, 1764, M. 14,690; overruling *Inglis v. Mirrie*, 1738, M. 14,690.

^(m) ——— v. *L. Lag*, 1684, M. 14,689; and see *Hamilton*, 1685, M. 14,686.

⁽ⁿ⁾ Ersk. 3, 9, 40.

^(o) Ersk. 3, 8, 84.

^(p) *Campbell v. M'Intyre*, 12 June 1824, 3 Sh. 126, N. E. 85.

^(q) *M'Culloch v. Wallace*, 12 Nov. 1846, 9 D. 82.

^(r) *Blisset's Trs. v. Hope's Trs.* 7 Feb. 1854, 16 D. 482.

half of the trust, although no quorum was specified. In the last case, Lord Rutherford observed, "Under a trust of this nature, which gives the trust not only to the persons named generally, but to the acceptors or survivors of them, I have no doubt that implies power in the majority to act, but especially against one of their own number who is recusant."^(s) A voluntary association or committee is also entitled to act by a majority.^(t)

1742. Executors *qua* next of kin are entitled to sue separately for their own shares. In *M'Target's* case, it was held that an executor-nominate was entitled to sue the representatives of another executor for his share of the succession; and this although a third executor, who had not intromitted, refused his concurrence.^(u) In *Rogerson v. Barker* ^(x) an action of count and reckoning was raised by six co-executors against a partner of the deceased; and two of them having afterwards executed a disposition *omnium bonorum*, on the motion of the defenders the action was dismissed, in so far as the bankrupt executors were concerned. An objection having been afterwards taken, that the title of the four continuing executors was bad, in respect that it was necessary for the whole body of original executors to sue collectively, Lord Corehouse, after advising with the Court, repelled the objection. Lord Medwyn, commenting on this case, said that the circumstance that the action was originally raised in the names of the bankrupt executors was immaterial, and that the decision would have been the same if those two had been denuded of their right (by the disposition) before action was raised, and they and their trustees had refused to concur.^(y) And in *Torrance v. Bryson*,^(z) in which the previous authorities were carefully considered, the right of one out of a plurality of executors to sue his co-executor for his share of the succession was unanimously affirmed; Lords Moncreiff and Medwyn holding that he might have sued a stranger to the same extent, in the event of his co-executors refusing to concur. But it has never been decided that a majority of the executors can sue collectively for the whole of the deceased's debts, though it would obviously be expedient to establish this as a rule applicable both to trustees and executors, since in practice the two offices are conjoined.

Executors *qua* next of kin may sue separately for their shares of the succession.

1743. Where a quorum is provided for, it is necessary that the required number should not only attend the meetings, but also

Usual powers of a quorum of trustees.

^(s) 16 D. 485.

^(x) *Rogerson v. Barker*, 9 Mar. 1838, 11

^(t) *Fife & Kinross Ry. Co. v. Deas*, 4 Jan. 1859, 21 D. 187.

Sh. 568.

^(y) *Vide* 4 D. 74, in *Torrance v. Bryson*, *infra*.

^(u) *M'Target v. M'Target*, 12 May 1829, 7 Sh. 591, explained by Lord Medwyn in *Torrance v. Bryson*, *infra*.

^(z) *Torrance v. Bryson*, 24 Nov. 1841, 4 D. 71.

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consent to the acts of the trustees. (a) A quorum may consist either of a fixed proportion of the trustees—usually a majority—or of a definite number. In the former case, it is understood that a majority of the accepting and acting trustees, although less than a majority of those nominated, constitutes a quorum; but to prevent disputes, the provision is usually so expressed in the settlement. In an action in which two of the accepting trustees were called as defenders, it was held that a majority of the remainder were entitled to sue as trustees. (b) Where the quorum consists of a definite number, as three, and only two survive, the Court will appoint a factor. (c) And where only a quorum of three remained, and they differed, action was sustained at the instance of *two* against the recusant trustee, to compel him to concur in signing a discharge; the Court holding that the trustee was bound to submit to the will of the majority, unless he had conceived the loan to be an improper transaction, in which case he ought to have complained to the Court. (d) A declaration that the majority shall form a quorum, does not prevent the trust continuing in the persons of two trustees, (e) who in that case must act jointly, (f) or even in the person of a sole accepting or surviving trustee.

Concurrence of whole body of trustees, whether requisite to acts of extraordinary administration.

1744. Where no quorum is named, it rather appears that acts of extraordinary administration, as the alienation or ultimate distribution of the trust-estate, (g) are not valid without the concurrence of all the accepting trustees. When the number of the trustees is reduced to two, it is obvious that both must concur in everything, as the trust then practically resolves into a joint appointment. (h) It has been doubted whether acts of extraordinary administration, as the exercise of a power of sale, are valid when executed by a majority, even when the trust-deed declares the

(a) Bell's Pr. § 1993-5; *Lynedoch v. Ouchterlony*, 15 Feb. 1827, 5 Sh. 358, N. E. 382. As to the powers of a quorum of tutors, see Fraser on Parent and Child, 210, and cases there cited.

(b) *Shanks v. Aitken*, 4 March 1830, 8 Sh. 639.

(c) *Ireland v. Glass*, 18 May 1833, 11 Sh. 626.

(d) *Lynedoch v. Ouchterlony*, *supra*. See *Cumming v. Hay*, 28 Feb. 1834, 12 Sh. 508; and Lord Wood's opinion in *Logan v. Meiklejohn*, 5 D. 1072.

(e) *Laird v. Miln*, 7 Dec. 1833, 12 Sh. 187.

(f) *Heriot's Trs. v. Fyffe*, 8 Mar. 1836, 14 Sh. 670.

(g) Ersk. *supra*; *Freen v. Beveridge*, 28

June 1832, 10 Sh. 727; but see observations of Lord Colonsay on this case in *Blisset's Trs. v. Hope's Trs.*, *supra*; *Pet. Wylie*, 28 June 1850, 12 D. 1110; *Scott v. Reid*, 16 Feb. 1822, 1 Sh. 832, N. E. 308.

(h) *Moffat v. Robertson*, 31 Jan. 1834, 12 Sh. 376, *per* Lord Corehouse. In England the consent of the whole body of trustees appears to be requisite to all acts of administration, even to the authentication of receipts, unless special powers are conferred on the majority; *Hall v. Franck*, 11 Beav. 519, 18 L. J. Ch. 362, where, however, the objection was that the receipt was signed by one only of *two* co-trustees. But trustees for charitable or public trusts may act by a majority; Lewin on Trusts, 5th ed. p. 212.

majority to be a quorum.⁽ⁱ⁾ Where, as in the Bankruptcy Act, CHAPTER LIV. the consent of a majority in number and value of the creditors is required to validate a transaction, the condition will be strictly enforced; and so the Court has reduced a trustee's certificate for the bankrupt's discharge, because the signature of one of the parties, whose consent was necessary to make up the statutory majority, had not been adhibited to the concurrence.^(k)

1745. Although no act or proceeding of the trustees collectively can be valid unless assented to by at least a majority of their number, it is equally clear that a minority, or one of two joint trustees, are entitled to raise actions in their character as individual trustees, where this is necessary either for the protection of the estate or for their own exoneration.^(l) As an example of the first class of cases, we may mention that of *Reid v. Maxwell*,^(m) where the Court passed a note of suspension and interdict at the instance of a minority of trustees, to prevent the majority from carrying into effect a resolution passed at a meeting of trustees, by which they proposed to assume additional trustees, and which, it was alleged, was objectionable and had been brought about by unfair means and concealment. And in the case of *Taylor v. Noble*⁽ⁿ⁾ it was found that one of two joint trustees was entitled to raise a multiplepinding in the name of both, and to insist therein to the effect of obtaining his own exoneration. But after a majority of trustees, by whom an action has been raised on behalf of the trust, agree to abandon the suit, an individual trustee is not entitled to insist in it to the extent of his own interest under the trust; though his right to raise a separate action may be reserved.^(o)

1746. When a corporation is associated with other parties in the management of a charity, it may be doubted whether the corporation, being a distinct person in law, is entitled to more than a single collective vote. In such cases the Court will not interfere with the established custom of voting, if it is of long standing. So it was decided where the usage had been for "the minister and remanent members of the kirk-session" to vote collectively, under a destination to them and certain individuals.^(p) But where the destination is to the heritors, minister, and kirk-session of a parish,

Minority may defend actions and take proceedings necessary for the protection of the estate.

Where a corporation is appointed trustee, whether the members vote individually or collectively.

⁽ⁱ⁾ *Scott v. Reid*, 16 Feb. 1822, 1 Sh. 382, N. E. 308, where a bill was passed to try the question.

^(k) *Wylie & Lochhead v. Young*, 24 Feb. 1859, 21 D. 577.

^(l) *Scott v. Reid*, and *Logan v. Meiklejohn*, *supra*; *Blisset's Trs. v. Hope's Trs.*, 16 D. 482.

^(m) *Reid v. Maxwell*, 6 Feb. 1852, 14 D. 449.

⁽ⁿ⁾ *Taylor v. Noble*, 24 Nov. 1836, 14 Sh. 817.

^(o) *Coulter v. Forrester*, 11 June 1823, 2 Sh. 387, N.E. 343.

^(p) *Halden v. Rhymer*, 1707, M. 2387; *Pet. Leslie*, 9 June 1814, F.C.

CHAPTER LIV. each individual is entitled to a separate vote ; because a parish is itself a corporation, of which the minister and kirk-session are individual members.(q) And where money was bequeathed to a *district* of a parish, to be under the management of the patrons or overseers of the poor of said *place*, it was held, notwithstanding an adverse usage of eighty years, that the heritors of the whole parish were entitled to a joint management along with the kirk-session, and not merely the heritors of the particular district.(r)

Trust not affected by change in constitution of corporation.

1747. Where the management is vested in the individual members of a corporation in conjunction with other parties, and the constitution of the corporation is afterwards changed, or the number of the corporators increased, the right of acting and voting will continue with the whole members of the new corporation,(s) unless the number of the trustees is expressly limited by the deed of constitution.(t) And where the statutes of an hospital devolved certain duties on one of the deacons of the Incorporated Trades, who were *ex officio* members of the Town Council of Edinburgh, and as such governors of the hospital, it was found that the deacons were no longer entitled to a share in the management, after they had been deprived by the Burgh Reform Act of their seats in the Town Council.(u) By 3 & 4 Will. IV., §§ 20 & 23, provision is made for the continuance of trusts vested in municipal corporations under the old constitution. Where any trust is conferred on members of the municipal corporation, under the denomination of "old provost, old bailie, or old dean of guild, or of merchant or trades bailies, or merchant or trades councillors," the reformed town councils are required to elect trustees. If, on the other hand, the trust is vested in office-bearers of trading corporations, without reference to their municipal character, the right of management is continued to such office-bearers.

SECTION IV.

OFFICE AT COMMON LAW CANNOT BE DELEGATED.

Consequences of irregular or unauthorised devolution of a trust.

1748. A trustee has no power at common law to devolve the trust upon other persons.(x) Care must therefore be taken, in the

(q) *E. of Galloway v. Kirk-Session of Dalry*, 22 Feb. 1810, F.C.

(r) *Cardross*, 1789, note to case of *E. of Galloway*, *supra*.

(s) *Incorporated Trades of Edinr. v. Gov. of Heriot's Hospital*, 14 Sh. 879, *per* Lord President Hope.

(t) *Gov. of Gordon's Hospital v. Min. of Aberdeen*, 8 July 1881, 9 Sh. 909.

(u) *Trades of Edinr. v. Heriot's Hospital*, 3 June 1886, 14 Sh. 878.

(x) *Stair*, 1, 12, 6 & 7 ; *Ersk.* 3, 8, 84 ; *Freen v. Beveridge*, 28 June 1882, 10 Sh. 727 ; *Rennie v. Ritchie*, 25 April 1845, 4 Bell, 221 ; *Ferrie v. Baird*, and *Davidson v. Mackenzie*, *infra*. In England, the maxim "delegatus non potest delegare" was at one time applied to the actings of trus-

exercise of powers of assumption, not to deviate from the conditions of the power, else the nomination may be set aside as a devolution of the trust. If trustees should unfortunately convey the property to successors, in circumstances or under conditions unauthorised by the deed of settlement, the consequences may be serious. Not only will the conveyance be null, as amounting to a devolution of the trust, but every act of the new body is liable to be set aside as irregular and ultroneous. Meanwhile the trust will be held to subsist in the persons of the surviving original trustees, who will therefore be made responsible for any loss which may have been sustained through the maladministration of their successors; and before they can proceed to execute a valid deed of assumption, or to dispose of the property in fulfilment of the purposes of the trust, it will be necessary to clear the title by raising an action of reduction of the illegal deed of conveyance. (y)

1749. Thus, where a person had acted as trustee for a lengthened period without a sufficient title, he was not allowed to recover from the estate sums which he had advanced to beneficiaries, except in so far as they were made out of the annual proceeds of the property, and in accordance with the directions of the truster. (z) Where a power was given to supply places in the trust, vacant by death or non-acceptance—and there were two such vacancies—an assumption of three new trustees was found void as to all the three, the Court having no means of deciding which of the three had been nominated under the powers of the trust. (a) In another case, where, under a general power of assumption, additional trustees were assumed by one of two accepting trustees, without the concurrence of his colleague, who had refused to act, it was held that the assumption was *ultra vires*, and that the trustees so assumed had no title to pursue an action, although they had acted for several years

What held to amount to an illegal devolution of the trust.

tees in a spirit of blind and ruthless adherence to the literal text. The supposed fascination exerted over the legal mind by the antithetical terminations “-atus, -are,” of the phrase, is the subject of a characteristic episode in Bentham’s *Principles of Legislation*. The maxim is still so far *in viride observantia* that a trustee cannot, as in Scotland, depute the active management of the estate to a factor; but he may now transmit money to a co-executor, or other confidential person at a distance, for the purpose of distribution, without being held responsible for loss; Lewin on Trusts, 5th ed. p. 207; or employ a steward in case of necessity, at the risk

of the estate. Necessity, said Lord Cottenham in *Clough v. Bond*, 8 M. & C. 497, 8 L. J. Ch. 51, would include the regular course of business. Yet in that very case the Lord Chancellor held the representatives of a party liable for the loss of trust-money, deposited in bank in the joint names of one trustee and of the husband of the other, on the ground that the husband had no right to interfere. So strictly is delegation prohibited.

(y) *Freen v. Beveridge*, *supra*.

(z) *Heriot’s Trs. v. Fyffe*, 8 Mar. 1836, 14 Sh. 670.

(a) *Ferrie v. Baird*, 31 May 1834, 12 Sh. 672.

CHAPTER LIV. without challenge in the administration of the trust. (b) But Lord Mackenzie said that the question was still open, whether homologation of the deed by the recusant trustee might not have validated the appointment, that plea not having been raised on record.

Practical
suggestions.

1750. Where a power is given of appointing new trustees *in place of* others who may die or resign, it would not be advisable to appoint less than the full complement. But such powers ought to be framed in terms which entitle the surviving and accepting trustees to nominate as many additional trustees as they may consider expedient. The Court will award sequestration of a trust-estate pending a dispute as to the title of the trustees to administer. (c) In practice it is understood that a power to assume new trustees does not entitle the assumed trustees to exercise the office of executor. And accordingly, the Commissary Courts do not grant confirmation in favour of assumed trustees.

Assumed trustees have not the powers of executors.

(b) *Davidson v. Mackenzie*, 9 July 1835, Sh. 538; see *M'Taggart's Rep. v. Robertson*, 18 Sh. 1082, 25 Jan. 1834, 12 Sh. 338; *Flucker v. Noble*, (c) *Horne v. Hunter*, 7 Mar. 1833, 11 24 May 1836, 14 Sh. 817.

CHAPTER LV.

ACCEPTANCE AND DISCLAIMER OF THE OFFICES OF
TRUSTEE AND EXECUTOR.I. *Of Acceptance.*II. *Of Disclaimer.*

1751. The relation of truster and trustee is completed by acceptance. (a) Assuming that the trustee is qualified to act, he ought, when the trust comes into operation, to make up his mind without delay, whether or not he will accept the office. It can scarcely be necessary to say that legal advice will be of little or no service in settling a question of this nature. Indeed, the only advice which a lawyer could give to his client, looking strictly to the interests of the latter, would be, never under any circumstances to accept a trust. The duties of trusteeship, accordingly, are usually undertaken from motives in which self-interest has little concern. While the legal adviser may not consider it necessary to dissuade his client from accepting the trusteeship, it will still be his duty to guard against the possibility of allowing any doubt to exist in regard to the *fact* of acceptance, and to take care that the resolution of the trustee, whether to act or to abstain from acting, should be expressed in writing. (b)

Trustee should either accept or disclaim in limine.

1752. The acceptance or declinature of trustees of testamentary settlements is usually declared at the meeting held after the funeral, which the parties named as trustees are asked to attend, when the settlements are read, and directions given for carrying the trust into execution. If the trust is accepted by a majority of the number entitled to act, the fact is set forth in the minute of proceedings. It is usual also at this meeting to appoint an agent or factor to the trust. The minute of acceptance ought to be signed by all the

How acceptance is declared.

(a) See Stair, 1, 12, 5.

(b) "Practically it is an advisable precaution," says Bell, 1 Com. 5th ed. p. 81, note 4, "where the majority of the trustees are named as a quorum, that the number of trustees accepting should be

defined by a declaration of non-acceptance on the part of those who decline; or who even in the meantime abstain from acting, reserving in this last case power to resume their place afterwards."

CHAPTER LV.

accepting trustees; and if any of the trustees have resolved not to accept, the declinature should also be minuted and authenticated by the non-accepting trustees. A minute of acceptance or declinature, or both, is frequently in practice indorsed on the deed constituting the trust, and recorded along with it. The neglect of these precautions has given rise to many difficult questions, both with reference to such acts as amount to constructive acceptance, and also as to the effect of delay in precluding the party from afterwards assuming the office of trustee. These cases we shall proceed to examine.

SECTION I.

OF ACCEPTANCE.

General rule as to acceptance.

1753. A trustee may signify his acceptance either by signing a minute or other document to that effect, or by completing a title in his person to the trust-estate; by representing himself as a trustee to parties who have dealings with the trust; by executing any power conferred by the truster; or finally, by acting as trustee, or permitting his name to be used as a party to the trust. If a trustee knows of his appointment to the office, and allows any considerable time to elapse without disclaiming it, very slight indications of acquiescence in the management will, in the absence of proof to the contrary, create a *presumption* that he has accepted. (c)

As to *locus pœnitentiæ* after informal acceptance.

1754. I. EXPRESS ACCEPTANCE OF THE OFFICES OF TRUSTEE AND EXECUTOR.—Written acceptance, although usually expressed by way of *minute*, may also be by letter. Though a signed minute, not holograph, may be good evidence of any ordinary resolution of the trustees, it is more than doubtful whether such a document, not homologated, could be held sufficient to establish acceptance against a trustee resiling *debito tempore*, so as to infer liability for the future acts and deeds of his co-trustees. Where the acceptance is by letter, it has been held that there is *locus pœnitentiæ*; assuming the trustee to withdraw before any step has been taken in consequence of his provisional acceptance. But a trustee will not be allowed to recede from his acceptance if he have actively interfered in the management, as by corresponding with his co-trustees on the affairs of the trust; or by giving directions for the recovery of debts; (d) or by attending a meeting of the trustees, and concurring in the ap-

(c) *Wise v. Wise*, 2 Jones & Lat. 408. (d) *Davidson v. Mackenzie*, 9 July 1885, 18 Sh. 1082; *Marshall v. Milne*, 1677, 1 Br. Sup. 780.
See also *Paul v. Boyd*, 22 Jan. 1838, 11 Sh. 292; *Logan v. Meiklejohn*, 26 May 1843, 5 D. 1066.

pointment of a factor.(e) And where trustees, who were also nominated tutors and curators, had given instructions to raise a summons for making up inventories of the minor's property, they were not allowed to disclaim the character of tutors-nominate, although no procedure had followed on the summons, and the minute declaring their acceptance of the office was unsigned.(f) But it would seem that if the trustee's intromissions have been of a merely formal character, he might, even under the old law, retire from the trust, with leave of the Court of Session, or with the consent of his co-trustees,(g) although he was not in a position to disclaim the trust at his own hand.(h)

1755. A trustee is presumed to have accepted if he make up titles in his person under the trust-disposition.(i) For the law will not permit him to accept the conveyance, except under burden of the trust which is the condition of the grant. The judgment in *Paul v. Boyd*, referred to by Mr Forsyth, as throwing doubt upon this doctrine,(k) merely asserted that an instrument of sasine is not conclusive and irrefragable evidence of the fact of sasine having been given to the disponent. If he can prove that the notary who executed the instrument in his favour acted without authority, then there is evidence to the Court that the trustee, in point of fact, had not entered into possession, and had not in that way given proof of having undertaken the trust. But we apprehend that trustees could not more effectually signify their acceptance of a trust of heritable estate, than by recording a sasine or notarial instrument in their favour. With respect to moveable property, any person obtaining confirmation as executor becomes a trustee for all concerned;(l) and *a fortiori*, an executor-nominate, who confirms as general disponent under a trust-deed, must be bound to carry out the purposes of the trust. The same result will follow from his taking out probate; and where probate is taken in terms of the 21 and 22 Vict., cap. 56, it is immaterial, with reference to liability, whether the property to be administered to is wholly in England or partly in Scotland, for an executor-nominate is bound by the laws of both countries to execute the purposes of the trust if he proves the will.(m)

Acceptance of trusteeship by making up titles to the trust-estate.

1756. Sometimes no more than a right of action is vested in trustees, as in the case of trustees for execution under marriage-con-

Acceptance by trustees appointed for execution in marriage-contracts.

(e) *Logan v. Meiklejohn*, *supra*.

prohibited by the trust-deed. *Infra*, chapter 56, section 8.

(f) *Mollison v. Murray*, 19 Dec. 1838, 12 Sh. 237.

(i) *Cumming v. Hay*, 28 Feb. 1834, 12 Sh. 508.

(g) *Logan v. Meiklejohn*, per Lord Justice-Clerk Hope and Lord Wood, 5 D. 1072-8.

(k) *Paul v. Boyd*, 22 Jan. 1838, 11 Sh. 292; Forsyth on Trusts, p. 72.

(h) And now, under the Trustee Acts, the trustee may resign at any time, if not

(l) Bell's Com. 656, 5th ed., 2, 81.

(m) Lewin on Trusts, 5th ed. p. 166.

CHAPTER LV.

Acceptance by acting as executor.

Whether competent to accept the trusteeship and decline the executry.

Trustee cannot be compelled to confirm as executor;

not liable as a vitious intruder for acting in conjunction with the executors.

tracts. In England, it has been held that parties appointed in this character, with their consent, may sue for specific performance without declaring their acceptance in writing.⁽ⁿ⁾ The trustee under a Scotch contract of marriage would put himself *in titulo* by registering the contract, with an acceptance indorsed thereon for execution.^(o) In England, if an executor be also constituted trustee of the real estate, it is held that his acting as executor is equivalent to acceptance of the entire trusteeship.^(p)

1757. A more difficult question arises where trustees are also appointed executors, and some of them are desirous of accepting the trusteeship and declining the executry. This point is of considerable importance in practice, as parties may be quite willing to act as trustees, who will not consent to confirm as executors, when the deceased may be largely interested in joint-stock companies, and the acceptance of the executry may involve unlimited liability to creditors. In such cases it may happen that one of the trustees is also an heir under the settlement, and is willing to take the risk of confirming as executor-nominate. If this is done, the title to the shares or other trust property stands in the books of the company in the name of the accepting executor, and no claim could be maintained against the persons of the other trustees on the ground that they were shareholders.

1758. Unless it could be shown that the powers of the executor in the case supposed would come into conflict with those of the trustees, we do not see that any objection could be taken to the position of the latter, or that any liability could attach to them as executors. The case is quite distinct from that of an executor-nominate wishing to decline the trusteeship. Confirmation as executor may amount to constructive acceptance of the trust; but acceptance of the trust cannot bind the trustee to accept the executorship, no person being obliged either to confirm as executor^(q) or to take probate^(r) against his will. Nor can it be said that the trustees would be liable to the penalties of vitious intromission if, instead of actually taking possession of the moveable estate of the deceased, they merely concurred with the executor in giving directions as to its disposal. Indeed their title as trustees would be a sufficient defence to the charge of vitious intromission.^(s) Apart from any apprehension of risk to the trustee (for which we can discover no grounds), there is no technical difficulty in allowing

(n) *Cook v. Fryer*, 1 Hare, 498.

(o) See *Melville, Petr.*, 8 March 1856, 18 D. 788.

(p) *Ward v. Butler*, 2 Moll. 538.

(q) Bell's Com. 5th ed. 2, 82.

(r) Williams on Executors, 6th ed. p. 263.

(s) Bell's Com. 5th ed 1, 661; also 2, 85.

the title to the trust-funds to stand in the name of the executor, while the administration is under the control of the entire body of the trustees. The office of trustee is personal,^(t) and is constituted by the act of acceptance, although no title may have been made up to the property.

1759. To illustrate this point, where trustees under a general settlement are directed to hold heritage for a specified time, and thereafter to convey, it has never been doubted that they might permit the heir-at-law to make up a title to the property, to hold it subject to the purposes of the trust, and thereafter to convey it to the beneficiary directly,—the trustees meanwhile drawing the rents and consenting to the ultimate conveyance. The accepting executor in the case supposed is substantially in the same position as an heir-at-law holding property at the pleasure of the trustees; executors being bound by the nature of their office to preserve the testator's funds for the uses which he has appointed, even when not intrusted with the execution of those uses. For example, an executor who confirmed as such in ignorance of the existence of a trust-settlement afterwards discovered, would hold the personal estate subject to the control of the trustees. Of course, if the trustees were to require the executor to apply the fund to a purpose which he conceived to be unauthorised, he would be at liberty to decline to pay or apply it without the protection of a decree of exoneration of a competent Court.

1760. The point in question has never been expressly raised either in the English or Scotch Courts, but the authorities, so far as they go, support the opinion which we have expressed. Lord St Leonards, on the authority of an early case, says that executors who have renounced probate *may execute a power* under the will.^(u) Mr Justice Williams considers that this doctrine is of doubtful authority, except in the case where the power is given to them in their proper names, and without reference to their office as executors. The learned author does not advert to the case which is most likely to arise in practice,—namely, where the power is given to them as trustees.^(x) But if a trustee who has not confirmed may execute all the *powers* of the settlement, it is reasonable to conclude that he may also give directions to the accepting executor regarding the distribution of the funds. Indeed the settlement itself would be binding on the executor as regards the destination of the estate; the question of the trustee's right to execute powers being in reality the only difficulty which the case presents.

Analogous case of heir-at-law making up title subject to conditions of the trust.

Case of executor confirming in ignorance of a trust.

Opinions of Lord St Leonards and Mr Justice Williams.

^(t) Stair, 1, 12, 17.

^(x) Williams on Executors, 6th ed. p.

^(u) 1 Sugden on Powers, 7th ed. p. 139. 275.

CHAPTER LV.

Trustee appointed tutor and curator not bound to accept.

Specialty where two trusts are contained in the same will.

Trustees not bound to act as guardians.

Effect of assuming the custody of moveable effects.

1761. In the law of Scotland we have no direct authority on the point; but the law of guardianship presents an argument from analogy.^(y) Not only is a trustee entitled to decline the guardianship, but where the same party is appointed tutor and curator, he may accept the office of tutor and decline that of curator, the matter being regulated by the Statute 1696, cap. 8. In an old case, where a testator appointed several executors, and constituted one of them "universal intromitter," the title of the latter to sue without the concurrence of his colleagues was sustained, "by reason that he was constituted only intromitter; and towards the rest of the executors in this case, that their office was frustrate, and of no avail."^(z) If the same parties are nominated trustees for two distinct trusts, and the two conveyancees are embodied in one settlement, it would seem that in England, if they accept the one, they will be held to have accepted both.^(a) This conclusion may be deduced from a consideration of the great inconvenience of allowing a separation of trusts in such cases; there being in almost all settlements some special and limited trust distinguishable from the general inheritance. But the point has never been decided in Scotland.^(b)

1762. Trustees, who are at the same time nominated tutors or curators, are entitled to decline the guardianship; for there is no necessary identity between the relation of guardian and that of trustee. But the intention to disclaim the offices of tutor and curator ought to be distinctly stated in the minute accepting the trust, or in a separate minute executed *debilo tempore*; else the presumption would be for a general acceptance.^(c) That presumption, however, could scarcely be supposed to hold, if the children had other guardians, or a father, entitled to act for their interest.^(d)

1763. II. CONSTRUCTIVE ACCEPTANCE OF THE OFFICE OF TRUSTEE.—It has never been held that acceptance of a trust is to be presumed in consequence of the trustee having taken possession of the property or effects *via facti*, until a legal custodier can be found. But possession of such a nature as would in the ordinary case infer a passive title, will, when the possessor is a trust-dispensee, go far to prove an intention to accept the office; the question of acceptance being merely one of fact, the proof of which is not restricted by

(y) *Mollison v. Murray*, 19 Dec. 1838, 12 Sh. 237, *infra*, § 1762.

(z) *Hamilton*, 1565, M. 14,686.

(a) *Urch v. Walker*, 8 My. & Cr. 702.

(b) As to the application of the doctrine of approbate and reprobate, see *Black v. Watson*, 9 Feb. 1841, 8 D. 522.

(c) *Mollison v. Murray*, 19 Dec. 1838, 12 Sh. 237.

(d) Although there are two old decisions, finding that tutors nominated by a stranger are bound to make up inventories as such—*Kilpatrick v. Macalpine*, 1798, M. 16,881; *Hamilton v. Hawkins*, there cited—the better opinion seems to be, that such tutors are mere trustees; Fraser on Parent and Child, 174; More's Notes, 35, 36.

any special rules of evidence. It may be asked, whether taking possession on a lease, in virtue of the general conveyance in a trust-settlement, is not an acceptance of the grant? If the trustee has intimated the assignment in his favour, or has recorded a notarial instrument where the lease is registered under the Act of 1857, it would seem that there is legal possession in virtue of the trust-conveyance. If there has been neither intimation nor registration, the intention of the trustee, as regards acceptance, must be looked to.

CHAPTER LV.

Taking possession on a lease, whether importing acceptance of the trusteeship.

1764. Amongst the acts of administration, inferring constructive acceptance and liability as trustee, are the concurring in the appointment of a factor,^(e) and the giving directions to recover debts.^(f) So also, if the trustee sist himself as a party to an action in place of the truster, or allow his name to be used in legal proceedings without entering a disclaimer on record,^(g) or concur in signing a discharge,^(h) or a receipt for money,⁽ⁱ⁾ or authorise the uplifting of funds,^(k) or give directions to his co-trustee to realise the trust property,^(l) he will be deemed to have acted under the trust, and will incur liability accordingly.

Acceptance by joining in acts of trust administration.

1765. In the case of *Blain v. Paterson*,^(m) one of three trust disponees declined, in the first instance, to accept; but, after the death of one of the acting trustees, accepted the trusteeship to the extent of joining in a deed of assumption, which assumption was made in virtue of the provisions of the trust-deed, and on the narrative that doubts had been entertained as to the power of a sole trustee to execute a valid assumption in terms of the deed. It was held that there were no grounds for subjecting the non-acting trustee in liability. In this case the learned judges seem to have given more than the ordinary weight to the declaration of immunity in the settlement. Again, if the interference of the trustee is clearly referable to causes not importing acceptance of the trust, as in *Mitchell v. Davidson*,⁽ⁿ⁾ where the pursuer had acted as clerk to the trust, but disclaimed the character of trustee, liability will not be presumed. And it is not to be inferred that a disponee has accepted the trust by reason of his having sent the trust-deed to the record for preservation. A trustee is entitled to the interim custody of

Acceptance not inferred from exercise of power of assumption to enable trust to be carried on.

^(e) *Logan v. Meiklejohn*, 26 May 1843, 5 D. 1066.

^(f) *Davidson v. Mackenzie*, 9 July 1835, 13 Sh. 1082.

^(g) *Gavin v. Kirkpatrick*, 30 May 1826, 4 Sh. 629, N. E. 637; *Logan v. Meiklejohn*, *supra*.

^(h) *Watson v. Crawcour*, 9 June 1843, 5 D. 1182.

⁽ⁱ⁾ *Blain v. Paterson*, *infra*.

^(k) *M'Millan v. Armstrong*, 6 Dec. 1848, 11 D. 191.

^(l) *Seton v. Dawson*, 18 Dec. 1841, 4 D. 310.

^(m) *Blain v. Paterson*, 28 Jan. 1836, 14 Sh. 361.

⁽ⁿ⁾ *Mitchell v. Davidson*, 20 Dec. 1855, 18 D. 284.

trust. The trustee is not to be considered as having accepted the trust until he has taken possession of the property and has begun to exercise the powers of the trust. He is not to be considered as having accepted the trust until he has taken possession of the property and has begun to exercise the powers of the trust. He is not to be considered as having accepted the trust until he has taken possession of the property and has begun to exercise the powers of the trust.

1766. It will be apparent from the terms of the decisions in relation to the trustee's acceptance, that a trustee has nothing to gain by declining to accept his appointment. On the contrary, the Court is always disposed to set up an honest trustee, who accepts the responsibilities of his office immediately, while any attempt at interposition by a trustee, either before or after giving notice of introduction to another capacity, is almost certain to involve the individual in the liabilities which he is anxious to avoid. A trustee, who, when other parties are associated in the trust, places himself at a terrible disadvantage by declining to declare his acceptance in a regular manner: being liable on the one hand to be excluded by his co-trustees from a voice in their deliberations; and on the other, to be called to account for acts of mismanagement, to which he may be presumed to have assented, notwithstanding his enforced abstinence from any active participation in the mischief.

1767. Trustees who intrude with moveable property of a defunct without confirming as executors, or recording probate within a year and day, are in danger of subjecting themselves to the penalties of vitious intromission, and thus incurring universal liability for the trustor's debts,—not on the ground of fraud, but in consequence of “possession being taken contrary to the due order of law.” (o) And trustees who assume the offices of tutors and curators without having the inventories of the minor's estate judicially authenticated, are bound, notwithstanding the existence of a protecting clause, to account under the liabilities of the Act 1672, cap. 2. (p)

1768. If executors-nominate, under a settlement, choose to disclaim the trust, and allow another party to confirm as executor, the *executor-dative* is said to become a trustee for all concerned in the succession. (q) By this expression we are not to understand that the executor thereby assumes the character of a trustee for the execution of the purposes of the settlement. He holds the position

(o) *Forbes v. Forbes*, 12 June 1833, 2 Sh. 805, N. 10. 851.

(p) *Mullison v. Murray*, 19 Dec. 1833, 12 Mh. 207.

(q) Bell's Com. 683, 5th ed. 2. 82; *Kirkpatrick v. Innes*, 17 Mar. 1830, 4 W. & S. 55, per Lord Wynford.

Accepted
declined

Failure to file of
inventory, intromis-
sion, whether
involuntary
or voluntary,
without having
accepted.

Executor-dative
or heir making
up a title cannot
execute the
trust.

of a trustee, as explained by Mr Lewin, in no other sense than as taking the surplus assets after the ordinary administration, with notice of a trust.^(r) Any duty devolving upon him in relation to the succession will therefore be discharged by raising a multiple poinding, and consigning the balance in process.^(s) If there are trust purposes remaining to be carried out, the beneficiaries may apply for the appointment of a judicial factor, who will take up the fund for the purposes of administration and distribution. Again, if trustees should neglect to record a conveyance of lands in their favour, or an instrument of possession following upon it, and the heir-at-law makes up a title by service, such heir is merely a trustee for the purpose of disposing to the trustees under the settlement, and does not incur any liability as the representative of the truster.^(t)

1769. Where a person becomes a trustee by mistake, as by being infeft without his consent, it has been held that he is bound to grant a conveyance to the party in right of the fee; but he will not thereby incur liability as an accepting trustee.^(u) Nor will an heir-at-law, who has entered by service, not knowing that his rights are excluded by deed, be held to have incurred a passive title, though he will be bound to account for his intromissions,^(x) and to grant a conveyance of the estate to his ancestor's disponees.^(y) Where an estate was conveyed to a purchaser by assigning an unexecuted precept, and the friends of the purchaser, with the view of protecting the estate against the risk of forfeiture, caused the vendor to be infeft without the knowledge of either of the parties, it was found that the rights of third parties were not prejudiced by the arrangement; and the vendor having, as trustee for all concerned, granted a conveyance in implement of an assignation by the purchaser—an infeftment upon the trustee's conveyance was sustained as constituting a preference, although the first purchaser had been made bankrupt in the interval between the dates of the uncompleted assignation and the infeftment.^(z)

1770. When a trustee has accepted the office, he must bear in mind that he is not to sleep upon it, but is required to take an active part in the execution of the trust.^(a) The distinction, if there be any, between acting and non-acting trustees, is a very slender one; and trustees who rely too confidently upon the customary exemption from liability for omissions, rarely find in it an adequate

Trustee infeft
by mistake
bound to grant
a reconveyance.

Every trustee is
in law an acting
trustee.

^(r) Lewin on Trusts, 5th ed. p. 168.

^(s) See *Forbes v. Campbell*, 17 July 1845, 7 D. 1068.

^(t) *Aytoun's Crs. v. Aytoun*, 1784, M. 9732.

^(u) *Dallas v. Leishman*, 1710, M. 16,191; Bell's Com., 5th ed. 1, 31; Pr. § 1993, 3.

^(x) *Mercer v. Scotland*, 1745, M. 9786.

^(y) *Fraser v. Fraser*, Hume, 885.

^(z) *Beaton v. Mackenzie*, 1787, M. 1150.

^(a) Lewin on Trusts, 5th ed. p. 170.

CHAPTER IV.

Duty of assumed trustees in relation to retiring trustees.

protection against the consequences of neglect of duty. When a non-acting trustee authorises certain acts to be done through the intervention of the acting trustee, he is responsible for the due execution of his mandate, as much as if he had been the agent himself; as, for example, if he give authority to his co-trustee to realise the trust property, or deliver a receipt as a warrant to uplift funds, and the proceeds are afterwards misapplied. (b) When a trustee has been assumed into the management of a subsisting trust, he ought at once to inquire into the position and circumstances of the estate, and have the accounts audited and settled as at the date of his assumption. Where accounts were not so settled, the assumed trustees were found, in an action raised by the representatives of one of the beneficiaries, to be liable to give an account of the intrusions of their predecessors in so far as not audited, as well as of their own intrusions with that part of the estate conveyed to them; and the Court reserved the question as to the liability of the assumed trustees for any deficiency arising out of the intrusions in question. (c)

SECTION II.

OF DISCLAIMER.

A person nominated trustee is not bound to accept the trust.

1771. "A trust," says Bell, "cannot be constituted in the person of another without his consent, to the effect of obliging him to do any act, however innoxious to himself, or easy to be done." (d) And although it is not unusual before executing a settlement, especially if it be a marriage-contract, for the truster to obtain the consent of his friends to their nomination as trustees, yet an acceptance signified before the trust comes into operation, is not considered to import a legal obligation to undertake the duties of the office. There is always *locus poenitentiae* until the time when it becomes necessary to carry the trust into effect. If the law were otherwise, inexperienced persons might easily be entrapped into accepting a position of responsibility, the nature of which could not be accurately known whilst the property remained in the custody of the truster. The principle was thus explained by Lord Redesdale in the Irish case of *Doyle v. Blake*: "Though a person may have agreed in the lifetime of a testator to accept the executorship, he is still at liberty to recede, except in so far as his feelings may

(b) *Blain v. Paterson*, 28 Jan. 1836, 14 Sh. 861; *Seton v. Dawson*, 18 Dec. 1841, 4 D. 810.

(c) *Somerville's Trs. v. Wemess*, 8 Dec. 1854, 17 D. 151.

(d) 1 Bell's Com., 5th ed, p. 31; Pr. 2 1998, 8.

forbid it; and it will be proper for him to do so if he finds that his charge as executor is different from what he conceived it to be when he entered into the engagement;"(e) and, as regards moveable settlements at least, this is now understood to be the law of the United Kingdom. It must be remembered that the duty of a marriage-contract trustee, as protector of the contract, begins as soon as the marriage is contracted, although he may have no active duties to perform during the lives of the spouses.

1772. It is doubtful whether a trustee who means to disclaim is entitled to accept, in the first instance, with the view of concurring in the assumption of new trustees. It was held at one time by the Court of Session that it was the duty of a trust-assignee, in whose favour sasine had been taken without his knowledge, to reconvey on receiving payment of all expenses and being discharged of all warrandice.(f) But this must be considered as questionable law; because the disponent—who had never accepted the trust—was actually not in a position to take infeftment; and the sasine, having been given without a mandate, was a nullity. In such a case we see no good reason for compelling the disponent to grant a deed in a character which he had never assumed, and which did not lawfully belong to him. A reduction of the instrument would seem to be the more appropriate remedy.(g) In any view, a trustee infeft by mistake could not be deemed to have incurred responsibility by merely denuding in favour of the proper party. As to the assumption of new trustees by a party under no obligation to act, the authorities are favourable to the exercise of such a power by non-accepting trustees; and after the decision in *Blain v. Paterson*, to which we shall immediately refer, and Lord Brougham's *dictum* in *Miller v. Black's Trs.*, it would be impossible to object to a disclaimer on the ground that the trustee had concurred in executing a deed of assumption.(h)

Whether non-accepting trustee entitled to execute power of assumption.

1773. The rule of the common law (prior to the recent Trustee Acts) was, that a trustee who had intromitted with the trust-estate, or done any act implying acceptance, was understood to waive his privilege of disclaiming the office, and that he could not thereafter (unless empowered to resign) withdraw from its responsibilities, however onerous these might prove to be.(i) But the rule is an

A trustee who has intromitted cannot disclaim responsibility;

(e) *Doyle v. Blake*, 2 Sch. & Lef. 289. July 1837, 2 S. & M.L. 889, per Lord

(f) *Dallas v. Leishman*, M. 16,191; 2 Brougham.

Ill. 545; see 1 Com. 5th ed. p. 81.

(g) See *Paul v. Boyd*, 22 Jan. 1888, 11 Sh. 292.

(h) *Blain v. Paterson*, 28 Jan. 1886, 14 Sh. 361. See *Miller v. Black's Trs.*, 14

(i) Bell's Pr. § 1993, 4; *Lord Lynedoch v. Ouchterlony*, 15 Feb. 1827, 5 Sh. 358, N. E. 332, 7 July 1830, 4 W. & S. 148; *Cumming v. Hay*, 28 Feb. 1834, 12 Sh. 508; *Logan v. Meiklejohn's Trs.*, 26 May 1843, 5 D. 1066.

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but may withdraw while resunt integræ.

equitable one, and is not to be enforced oppressively. And therefore, when a trustee who had intimated that he would accept, but had differed *in limine* with his co-trustees as to the management of the trust, afterwards declined to act, his declinature was sustained as competent and timeous.^(k) And in a case previously referred to, where one of several trust-disponees declined to accept, but afterwards concurred in the assumption of a new trustee in place of one deceased, and the deed contained the usual clause of immunity, it was held unanimously that the joining in this formal act of administration, for the purpose of enabling the trust to be carried on, did not infer liability for intromissions either prior or subsequent to the deed of assumption.^(l) And a trustee who had merely concurred in executing a discharge—his concurrence being necessary to make up a quorum—and had afterwards gone abroad, was held not to have undertaken a general responsibility as trustee.^(m) In England the weight of authority tends to support the view, that the mere fact of subscribing a conveyance to the legal estate in favour of the parties on whom it would legally devolve, does not import acceptance of the trusteeship;⁽ⁿ⁾ Lord Eldon having held, in a leading case, that where the intention was to disclaim the trust, the instrument ought to receive that construction, though it was a conveyance in form.^(o)

Trustee who does not expressly decline may afterwards join in the administration.

1774. The simplest mode of declining a trust is to abstain from accepting, and from acts importing an acceptance. It has been observed, however, that a trustee who merely abstains from acting may afterwards assume the office;^(p) while one who expressly disclaims the office is held to have forfeited his position as an original trustee.^(q) But it is not very easy to determine what modes of declinature shall preclude a trust-dispensee from afterwards taking part in the administration. In *Blain's* case there was a written refusal to accept, yet the same person afterwards joined in a deed of assumption, and no objection was taken to the competency of this proceeding. Yet, if the refusal to accept has been made matter of solemnity, it ought to be treated as final; there being no authority for holding that a deliberately executed renunciation of a trust is revocable by the trust-dispensee. When the trust-disposition conveys the estate to certain parties, *and to the acceptors*, as trustees,

Secus, where the destination is to the acceptors.

(k) *Lady Bannerman v. Bannerman*, 1 Dec. 1842, 5 D. 229.

(l) *Blain v. Paterson*, 28 Jan. 1886, 14 Sh. 861.

(m) *Watson v. Craucour*, 17 Feb. 1844, 6 D. 688.

(n) Lewin on Trusts, 5th ed. p. 161.

(o) *Nicolson v. Wordsworth*, 2 Sw. 372.

(p) *Darling v. Watson*, 11 May 1825, 1 W. & S. 188; *Blain v. Paterson*, *supra*.

(q) Forsyth on Trusts, p. 71.

and some of their number execute a minute of disclaimer, while a quorum of the trustees agree to accept, it is evident that the non-accepting trustees become disqualified, under the terms of the conveyance, from afterwards coming in as original trustees. For the condition as to acceptance is purified as soon as each trustee has declared his resolution; and the conveyance will immediately take effect in favour of the accepting trustees, to the exclusion of non-acceptors.

1775. The case is equally clear where the name of a trust-disponnee has been omitted, with his sanction, in the deeds or proceedings necessary for vesting the estate. And accordingly, Prof. Bell has affirmed^(r) that the refusal by a trustee to allow his name to be inserted in infestments, would be equivalent to a refusal to accept; and he adds that the infestments so completed would be *prima facie* evidence of non-acceptance. When, on the other hand, a trustee is aware that his name is being used by his co-trustees in taking infestment, or as a party to legal proceedings, and he takes no means to interpell them, the question whether he has not accepted resolves into an issue of fact. Thus, in the case of *Logan v. Meiklejohn*,^(s) a trustee who had renounced the office after informing himself of the state of the trust affairs, was held not to be entitled to relief from liability for law expenses, inasmuch as he had neglected to record a disclaimer. Lord Justice-Clerk Hope observed—"I think it necessary that the pursuer should show either the concurrence of the trustees to his resignation, or that he had subsequently interpellated them from using his name. His dissatisfaction with the manner in which the trust was conducted makes against him; for it made the necessity the greater for him to come forward, and interpell them from the use of his name; but although for years his name is used, he enters no proper disclaimer."^(t)

Trustee allowing his name to be used without protest cannot disclaim.

1776. In *Paul v. Boyd* an attempt was made to challenge a sasine that had been executed twenty-five years previously, on the allegation that one of the trustees had never accepted. Lord Corehouse, Ordinary, observed that possession of a disposition by the attorney of a disponent "creates a *presumptio juris* that the disponent accepts of the disposition, and authorises sasine to be given to him in terms of it, and under its conditions. This presumption may be redargued by evidence; but no such attempt is made here." And accordingly the interlocutor, to which the Court adhered, sustained the sasine as valid and effectual, in the absence of any attempt to prove, extrinsic of the deed, either that the trust had or had not

Constructive acceptance is a question of fact.

(r) 1 Bell's Com. 845, 5th ed. p. 82.

(t) 5 D. 1073.

(s) *Logan v. Meiklejohn*, 26 May 1843, 5 D. 1066.

CHAPTER LV. been accepted.(u) On the other hand, in the case of *Mitchell v. Davidson*, a trust-disponee who had attended a meeting of trustees, and had written out a minute of the proceedings, in which he stated that he "declined giving any opinion or vote, or incurring any responsibility," was assoilzied from an action of accounting directed against himself, in conjunction with the other trustees. The Lord Justice-Clerk, adverting to a Chancery case,(x) observed, that such cases were not to be determined upon legal presumptions; they were matters of evidence in which the facts were of the greatest moment.(y) In the English case of *Wise v. Wise*,(z) it was ruled that the presumption in such cases was for acceptance; Lord St Leonards observing, "that where an estate was vested in trustees who knew of their appointment, and did not object at the time, they would not be allowed afterwards to say they did not assent to the conveyance, and it would require some strong act to induce the Court to hold that in such a case the estate was divested. He spoke with respect to the effect upon third parties; every Court and every jury would presume an assent."

Weight to be allowed to presumptions.

Judicial disclaimer of the trusteeship.

1777. A trust may be judicially disclaimed, upon cause shown, by an accepting trustee against whom action is raised to enforce his concurrence in the administration.(a) And *a fortiori*, if a trustee has not accepted, he is entitled to put in a defence of disclaimer when sued for implement of the trust;(b) or he may apply to the Court for authority to withdraw, if the fact of his non-acceptance is disputed.(c) If all the trustees disclaim, in an action of reduction of the trust-deed, the Court will not allow the action to proceed until the beneficiaries have been sisted or called for their interest.(d) If an original trustee have once accepted, it appears, according to English practice, that *his heir* is not entitled to disclaim;(e) this rule having been introduced, it is said, to prevent the legal estate from falling to the Crown as *ultima hæres*. This rule evidently has no place in the law of Scotland.

Effect of disclaimer in vacating the legal estate in the individual trustee.

1778. With respect to the legal effect of disclaimer, it is to be observed that any act of the nature of renunciation or disclaimer which is sufficient to free the trustee from responsibility, will also suffice to vacate his personal right to the estate. The right con-

(u) *Paul v. Boyd*, 22 Jan. 1833, 11 Sh. 292.

(x) *Conyngham v. Conyngham*, 1 Ves. sen. 522.

(y) *Mitchell v. Davidson*, 20 Dec. 1855, 18 D. 284.

(z) *Wise v. Wise*, 2 Jones & Lat. 408.

(a) *Dick's Trs. v. Pridie*, 9 June 1855, 17 D. 835.

(b) *Davidson v. Mackenzie*, 9 July 1835, 13 Sh. 1082.

(c) *Bannerman v. Bannerman*, 1 Dec. 1842, 5 D. 229, *per* Lord Cuninghame, 235; *Logan v. Meiklejohn*, *supra*.

(d) *Megget v. Thomson*, 8 Dec. 1827, 6 Sh. 224.

(e) Lewin on Trusts, 5th ed. p. 161.

ferred on the individual trustee is so far conditional, that it only vests upon acceptance. Failing such acceptance, the right lapses, and the entire fee of the trust-estate vests in the persons of the accepting trustees. Where infestment is taken or confirmation expedite in the names of the accepting trustees, there can be no doubt that the inchoate title of those who have not accepted is extinguished. The effect of disclaimer upon the title will depend on the terms of the trust-destination. If there are other trustees entitled to accept and to act by themselves, they may proceed at once to make up titles, by means of which the trust-estate may be vested in their persons to the exclusion of the non-accepting trustees. In the preceding chapter we have had occasion to consider what terms are sufficient to vest the estate in a limited number of accepting and surviving trustees. We refer to another chapter (*f*) for a fuller investigation of the manner of completing the title to a succession under a lapsed trust; premising that our observations upon the effect of a lapse by death or resignation are equally applicable to the case of trusts which are in abeyance in consequence of the declinature of the trustees.

Effect of disclaimer upon the title of the remaining trustees.

1779. A trustee who has *debito tempore* declined the appointment may afterwards be employed as a factor, commissioner, or agent, though it has been doubted whether he could claim remuneration for his services if the objection were taken. The Court will not appoint a trustee who has declined the trust to be judicial factor on the trust-estate. (*g*) The case of *Mitchell* (*h*) suggests a warning to professional men nominated as trustees, to abstain from all interference with the administration of the trust if they intend to renounce; since anything approaching to an act of administration may be seized hold of at some future time for the purpose of rearing up a case of constructive acceptance, which, if established to the satisfaction of the Court, would not only disentitle the trustee to professional remuneration, but might even subject him to responsibility for the acts of his co-trustees.

Non-accepting trustee may accept employment under the trust.

1780. The question has been raised, whether an executor or trustee-nominate may decline the trust, and at the same time claim a legacy in his favour. Mr Lewin is of opinion, but with hesitation, that he may. (*i*) A somewhat different opinion is expressed by Mr Roper, who says, (*k*)—"Bequests to individuals who are executors are considered *prima facie* to be given to them in that character;

Whether a non-accepting trustee may take a legacy under the will. Opinions of Lewin and Roper.

(*f*) Chapter 51.

(*h*) *Mitchell v. Davidson*, 20 Dec. 1855,

(*g*) *Pet. Pennycook*, 20 Dec. 1851, 14 D. 18 D. 284.

311; *Pet. M'Culloch*, 11 Dec. 1851, 14 D. 311.

(*i*) *Lewin on Trusts*, 5th ed. p. 162.

(*k*) *Roper on Legacies*, 780.

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a presumption to be repelled by the nature of the legacies or other circumstances arising in the will." It is not easy to discover any definite principle in the cases bearing on this point; though the tendency of the later decisions, both Scotch and English, is towards the view expressed by Mr Lewin. In *Reid v. Devaynes* (l) legacies given to persons by the description of "my very good friends," who in another part of the will were desired "to act as executors," were found not to be due in consequence of the legatees declining to act. In *Stackpoole v. Howell* (m) a testator disposed his estate upon trust to three individuals, and appointed them executors. He made two codicils, in which he gave these three persons legacies, not expressly as trustees and executors, but by their names and descriptions. The legacies in both cases were classed together, and of equal amount. The legatees renounced probate. Sir W. Grant said, the question was, whether it was not necessary to find circumstances to show that the legacy was intended for the executor in a distinct character, otherwise there was a *prima facie* presumption that it was intended to be given him as executor; and that there was something in the circumstance of the legacies being classified together and of equal amount. It seemed to him, therefore, that the testator had considered the legatees in the character of executors.

Legacy may be taken by non-accepting executor where not given to him in the special character.

1781. We shall now refer to the cases in which the Courts have given the legacies to non-accepting executors. In *Dix v. Reid* (n) a testator bequeathed to two individuals £50 each, upon condition of their acting as executors. In a subsequent part of the will he bequeathed "unto my cousin, Thomas King, the sum of £50, whom I appoint as joint executor in trust in this my will." King declined to act. The Master in Chancery reported that the legacy was due. Exception having been taken to his judgment, Sir John Leach overruled the exception, and considered that the gift was intended to be bestowed rather in respect of relationship than of his office. He, however, considered the case very doubtful. In *Cockerell v. Barber* (o) a testator, after giving a legacy to Mr Palmer, "his friend and partner," appointed him one of his executors, and made other devises and bequests in his favour, so that he was entitled to much greater benefit under the will than any of the other executors. By a codicil, in which Mr Palmer was described as one of the executors, a further legacy was bequeathed to him. Sir John Leach, V.-C., held that the legacy was not given to him in the

(l) *Reid v. Devaynes*, 8 Br. Ch. Ca. 95.

(m) *Stackpoole v. Howell*, 18 Ves. 417.

(n) *Dix v. Reid*, 1 Sim. & St. 237.

(o) *Cockerell v. Barber*, 2 Russ. Ch. Ca.

585.

character of executor, and that he would be entitled to it whether he accepted or not. This decision was confirmed by Lord Eldon. A similar decision was given in a recent case, under an application to the Lords Justices in Chancery for their opinion and direction.^(p) The bequest was in these terms: "I give to my friend, J. T., banker's clerk, and one of the executors of this my will, £50." J. T. having renounced probate, it was argued for the representatives of the executry estate, on the authority of the cases of *Stackpoole v. Howell* and *Reid v. Devaynes*, already mentioned, that the money was given to the legatee in his character as executor, and upon the implied condition that he would discharge the duties of the office. But their Lordships were of opinion that the legacy was not conditional on acceptance of the office of executor, and made an order declaring the legatee entitled to payment.

1782. The above are cases relating to executry alone. In *Andrew v. Trinity Hall*,^(q) the principle was extended to trusts of a discretionary nature. The testator had devised to the corporation of Trinity Hall, Cambridge, certain valuable property, coupled with the condition of founding certain fellowships; and by the same will he gave £100 and some plate to the College. The corporation declined to be a party to the institution of the fellowships on the terms proposed, and consequently did not accept of the trust of the real property. However Sir William Grant decided that they were entitled to the legacy of personalty, holding that the principle of election did not apply, since no legatee was disappointed by their refusal of the endowment; and that it was fair to presume that the testator's respect for the fellows, and his hope that they would comply with his wishes, had induced him to make them a present of £100 and the plate.

Extension of the doctrine to the case of discretionary trusts.

1783. Professor More, in stating the import of the Scotch authorities,^(r) says, that where it appears that the testator meant to give the legacy without regard to the acceptance of the office, it will not lapse. In two old cases^(s) it was found that legacies left to relatives appointed tutors in a settlement were not due when they did not accept the office, though it did not appear that their acceptance was made a condition of the bequest. A different judgment was obtained where a testator made the following provision in his settlement: "My said trustees are hereby requested, each of them, to accept of the sum of £500 stg. as a mark of my friendship,

Authorities in the law of Scotland.

^(p) *In re Dendy*, 31 L. J. Ch. 184.

^(r) 1 Notes on Stair, 37.

^(q) *Andrew v. Trinity Hall*, 9 Ves. 525.

^(s) *Scrimzeour v. Wedderburn*, 2 Feb. 1675,

See Vice-Chancellor Wood's remarks on this case in *Warren v. Rudall*, 1 Johns. & Hem. 1, 29 L. J. Ch. 548, 545.

M. 6857; *Leckie v. Renny*, 7 Dec. 1748, M. 6847.

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and the further sum of £105 each to purchase a hogshead of claret, as a recompense for their trouble in the management of my affairs, and as a further testimony of my affection for them." One of the trustees did not accept, and admitted that he had no right to the legacy of £105. But the Lord Ordinary (Meadowbank) found him entitled to the £500, and the Court, by a majority, adhered. The majority consisted of Lord President Hope, and Lords Craigie and Balgray. The two latter thought that, unless it could be shown that the performance of the duty of a trustee was a condition of the bequest, the legacy would be due whether they accepted or not. Lords Hermand and Gillies were of a different opinion, and thought both legacies were left to the trustees in their character as such.^(t) In the case of *Davidson v. Mackenzie*^(u) a doubt was expressed by Lord Gillies as to the competency of disclaiming a trust after the trustee had accepted a legacy; but we are left in ignorance of the terms of the trust-deed under which the election fell to be made.

Doctrine of
approbate and
reprobate, whe-
ther applicable
to such cases.

1784. The solution of this question, in relation to the law of Scotland, appears to depend upon the extent to which the doctrine of Approbate and Reprobate is applicable to the appointment of trustees. If applicable, it rests on the assumption that the legacy in question is given upon condition that the legatee accepts the disposition of the testator's property, and such conditions are not to be established by mere inference or conjecture, but only upon the clearest implication.^(x) Now, the grant of a legacy to a trustee does not seem necessarily to *imply* that the legacy is given conditionally on his accepting the trust, unless there are words denoting that it is given in acknowledgment of his services. Trusteeship being at common law a gratuitous office, the presumption rather is, that the legacy was *not* given in consideration of services in that capacity; and as the trust does not lapse by the failure of the trustees, there is the less reason for maintaining that the intentions of the testator would be defeated by reason of such failure. On the contrary, there may be very good reasons why a beneficiary should renounce the trusteeship; since, in the event of a conflict of interest between himself and the other beneficiaries, he could hardly be expected to hold an even balance. To these considerations we may add, that next of kin—who are executors at common law—are not obliged to confirm as a condition of claiming the succession.

^(t) *Henderson v. Stuart*, 13 Dec. 1825, 4 Sh. 306, N. E. 809.

^(u) *Davidson v. Mackenzie*, 13 Sh. 1084, note.

^(x) 1 Bell's Com. 5th ed. p. 150.

CHAPTER LVI.

ASSUMPTION, NEW APPOINTMENT, AND RESIGNATION
OF TRUSTEES.

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| I. <i>Assumption and Nomination of New Trustees.</i> | II. <i>Appointment of Trustees by the Court.</i>
III. <i>Resignation of Trustees.</i> |
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SECTION I.

ASSUMPTION AND NOMINATION OF NEW TRUSTEES.

1785. By the provisions of the Trustee Act (*a*) there is now imported into every trust-deed in which gratuitous trustees are nominated a power to the trustee (if there be only one), or to the trustees, or a quorum of them, to assume new trustees. The same power has been very generally conferred by trusters in private settlements; and where a power is given in special terms, the special power will supersede that of the statutory enactment, which is only to be operative where the contrary is not expressed. Care should therefore be taken, where a power of assumption is given *per expressum*, that the special power should be at least as broad as that which is conferred by the Statute. Powers of assumption are usually given by a special clause, but they may be conferred by words of destination in the dispositive clause, as in a destination to such persons "as may be assumed by my said trustees to act along with them." (*b*) Powers of assumption are discretionary, and therefore the acts of original trustees cannot be disputed merely on account of their having delayed to fill up vacancies in their number. It does not appear to be very material whether the power is expressed in words directory or imperative. But the truster can effectually

Assumption of trustees under the provisions of Trustee Act 1861.
Constitution of powers of assumption.

(*a*) 24 & 25 Vict., cap. 84, explained by 26 & 27 Vict., cap. 115. See the English Act, 23 & 24 Vict., cap. 145, § 27, as restricted by § 34.

(*b*) *M'Leish's Trs. v. M'Leish*, 25 May 1841, 3 D. 914.

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enforce observance of a direction to assume, by providing that no act of the trustees, *other than that of assumption*, shall be lawful, unless assented to by a specified number of trustees. This form of clause is recommended as preferable to a simple proviso, that a specified number of trustees shall be requisite to form a quorum; for, supposing their number to be reduced by death or non-acceptance to less than a quorum, the effect of such a proviso would seem to be, that no deed of assumption could be executed for want of a quorum to sign it. There is, however, some authority of a contrary tendency.(c)

Whether a non-accepting trustee may exercise a power of assumption.

1786. In the case of *Blain v. Paterson* (d) the Court refused to find a trustee liable for intromissions who had merely accepted to the effect of concurring in a deed of assumption, his acceptance being necessary to make a quorum; and again, in *Miller v. Black's Trs.*, Lord Brougham observed that, "though the trustees are only empowered to assume on vacancies, that is quite sufficient for continuing the trust, and would make it their duty to continue it, even if they altogether decline themselves."(e) Such a devolution of the trust may perhaps be regarded as analogous to the conveyance of an estate by the heir-at-law to his ancestor's disponent; since it is a duty which, according to Lord Brougham, he cannot refuse, and for the exercise of which he cannot of course be made responsible. The provisions of the Trustee Acts, enabling trustees to resign, furnish the means of avoiding liability for concurring in acts of assumption, or other formal proceedings.

Quorum, whether requisite for purposes of assumption.

1787. While the failure to obtain a quorum of accepting trustees would raise no obstacle to the assumption of others in their room, the failure of a quorum by death may create a difficulty.(f) It seems best, therefore, to leave powers of assumption to be exercised, when necessary, by a sole accepting or surviving trustee; although to other effects a sole trustee may very properly be prohibited from acting.

Powers of assumption, in what manner exercised.

1788. The assumption of trustees is effected by deed of appointment (c) If the power is directory, the survivors seem to be entitled to appoint, although numerically below the standard of efficiency, as has been found in several English charity cases. Thus, in *Att.-Gen. v. Floyer*, 2 Vern. 748, where six trustees were empowered, when reduced to three, to fill up the vacancies, and all died but one, it was held competent to the survivor to execute the appointment, which he was bound to have made at an earlier period. To the same effect is the *dictum* of Chief Baron Eyre in *Dupleix v. Roe*, 1 Anst. 86,

that where a quorum for election was specified, the trustees, when reduced to that number, were compellable to elect. See the Scotch cases, *infra*, p. 265. On the construction of special clauses in powers of assumption, see Lewin on Trusts, 5th ed. pp. 459-475.

(d) *Blain v. Paterson*, 28 Jan. 1836, 14 Sh. 861.

(e) *Miller v. Black's Trs.*, 2 S. & M'L., p. 889.

(f) But see *infra*, §§ 1805, 1806.

ment, which is effectual though executed on deathbed. (g) Mere nomination, however, confers only a personal right to the estate; the title of assumed trustees must be completed, like that of other singular successors, by a proper deed of conveyance. The usual mode of investiture is by deed of assumption and conveyance, whereby the new trustees are formally nominated and appointed, and the trust-estate is conveyed by the original trustees, or by such number of them as are entitled to act in the trust, to and in favour of themselves and the persons assumed, with the like destination and the same provisions for a quorum as are contained in the original trust-deed. (h) If lands are conveyed, the deed of assumption will contain the usual clauses of resignation and registration, and the title will be completed by recording the deed or a notarial instrument upon it under the Titles to Land Acts. The position of assumed trustees, as regards title and interest, is similar to that of additional trustees nominated by the truster himself; and therefore, where the original trustees have only a personal right, the title of the new body will fall to be completed in the same way as that of a mixed body of original trustees, consisting of disponees and also of trustees appointed by simple nomination. In a case of this nature, Lord Cowan observed, "I have generally thought it the safer course for the surviving trustees to execute a disposition in favour of the additional trustees, and for the whole body, original and additional, to obtain infeftment under the feudal clauses." (i) Where the whole original trustees have predeceased the granter, his Lordship added that the additional trustees would make up their title by constitution and adjudication; which proceeding, or rather a declaratory adjudication, (k) would seem also to be appropriate to the case of assumed trustees, in whose favour no valid disposition has been executed by the original trustees. However, a majority of the judges in *Mackilligin's* case were of opinion, that as regarded trustees nominated by the truster, they, at all events, were entitled to

(g) Bell's Pr., 2 1998-5; *Roughead v. Hunter*, 5 March 1833, 11 Sh. 516.

(h) See *Martin v. Wight*, 3 Feb. 1841, 3 D. 485.

(i) *Mackilligin v. Mackilligin*, 21 Nov. 1855, 18 D. 96. In *Warburton v. Sandys*, 14 Sim. 622, 14 L. J. Ch. 431, Sir L. Shadwell expressed his opinion to the effect that an assumed trustee was not invested with the character of trustee until he had been duly nominated, and the trust property had also been duly conveyed or as-

signed. But Sir J. Romilly has since decided that a transfer of the fund is not necessary to perfect the appointment, or to give the assumed trustee a title to sue for payment of the trust-fund; *in re Law*, 4 Beav. 509, 11 L. J. Ch. 118; and it is the general opinion in England that an assumed trustee may exercise a power of sale, although the property has not been vested in his person by conveyance; Lewin on Trusts, 5th ed. p. 460.

(k) Parker on Adjudications, p. 85.

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take infestment along with the original trustees upon the deed of settlement.^(l)

Titles, how completed in the persons of assumed trustees.

1789. The personal property of the trust will be carried to the new trustees by the general disposition and assignation in the deed of assumption. Public stock and shares should be transferred, in the books of the company, into the names of the new body. If the original trustees have also been confirmed executors, it is considered that their functions as executors terminate with the collection of assets, payments of debts, etc.; after which, the character of executor becomes merged in that of trustee,—as is evident, indeed, from the maxim, that an executor, after payment of debts, is a trustee for all concerned. There is no necessity, therefore, for any new appointment of executors, nor does such an appointment appear to be competent.

Whether a power of assumption may be exercised by less than a quorum of the trustees.

1790. Where, in consequence of supervening incapacity or non-residence, a quorum of the accepting and surviving trustees cannot be got to concur in an assumption, the question arises, whether the surviving acting trustees or trustee are entitled to execute a deed of assumption? In *Nisbet v. Fraser*,^(m) one of two surviving trustees having gone abroad, the Court appointed a judicial factor, holding that the trustees were bound, by the directions of the deed, to have executed an assumption as soon as their number became reduced to two, and that there were doubts as to the power of the resident trustee to act alone. In a subsequent case, where the validity of a deed of assumption executed by one of two surviving trustees was questioned, the other trustee having gone abroad, the Second Division, on the report of Lord Cuninghame, decided that the assumption was valid; and Lord Justice-Clerk Hope referred to the case of *Nisbet v. Fraser* as establishing that a party resident out of the country was *not* to be considered as a trustee to the effect of the trust being taken to be full.⁽ⁿ⁾ But in two subsequent cases^(o) it was held that, where the acting trustees had been reduced to the number of two, and there were other trustees resident abroad permanently, a deed of assumption by the acting trustees was invalid. Where a power to assume was conferred in case of non-acceptance or failure, “before the purposes of the trust are fulfilled,” and certain of the trustees had *predeceased* the testator, the accepting trustees were found entitled to assume others in place of

(l) See the opinion of Lord Justice-Clerk Hope, 18 D. 90.

(m) *Nisbet v. Fraser*, 31 Jan. 1835, 13 Sh. 884.

(n) *Watson v. Craicour*, 17 Feb. 1844, 6 D. 687.

(o) *Smith v. Smith*, 20 March 1862, 24 D. 888; *Kelland v. Douglas*, 28 Nov. 1863, 2 Macph. 150.

those who had died.(p) A similar construction of powers of assumption has been adopted in England.(q) CHAPTER LVI.

1791. Powers of assumption are frequently combined with a provision for enabling the trustees to resign. Where this is the case, it may be incumbent on the retiring trustee to see to the appointment of his successor; as it might be held that the exercise of the right to retire was conditional on filling up the vacancy.(r) A testator may be unwilling to confide in the discretion of a very limited number of trustees; and while he may be desirous of giving facilities for retirement on reasonable grounds, he is entitled to expect that means will be taken, in conformity with the powers which he confers, to have the proper number kept up. Sometimes there is a direction to trustees to convey, at the expiration of a specified period, to persons of a certain class, who are to hold the property for purposes charitable or public. Such persons, who may be denominated trustees of the second order, are usually *ex officio* trustees, and are not considered as *personæ delectæ*. Although the position of an assumed trustee, while he continues to hold the office, is precisely the same as that of an original trustee, yet it has been observed that the Court will more readily entertain an application for the removal of an assumed trustee than of an original trustee, because they are not then interfering with the appointment of the testator.(s) On the other hand, the Court will not in general appoint a factor on a trust-estate where the deed provides the means of continuing the trust by the assumption of new trustees.(t)

Powers of resignation may be made conditional on assumption of new trustees.

Assumed trustee not *persona prædilecta*.

1792. By section 11 of the Trusts (Scotland) Act 1867,(u) it is enacted, that "when trustees have the power of assuming new trustees, such new trustees may be assumed by a deed of assumption executed by the trustee or trustees acting under such trust-deed, or by a quorum of such trustees, if more than two, in the form of the schedule (B) to this Act annexed, or to the like effect; and a deed of assumption so executed, in addition to a general conveyance of the trust-estate, may contain a special conveyance of heritable property, and in such case may, with the necessary warrant of registration thereon, be recorded in the Register of Sasines, and when so recorded shall be effectual as a conveyance of the heritable property belonging to the trust-estate, so far as specially conveyed, in favour of the existing trustees and the trustees so to be

Appointment of new or additional trustees by deed of assumption under the Trusts Act.

(p) *Stevenson v. Ewing*, 12 Dec. 1849, 12 D. 340.

(s) *Pet. Macpherson*, 18 Dec. 1840, 3 D. 315.

(q) *Lewin on Trusts*, 5th ed. p. 465.

(t) *Pet. Dunlop*, 11 Mar. 1835, 13 Sh. 681.

(r) See the provisions on this point of 30 & 31 Vict., cap. 97, sect. 10 (*infra*, § 1827).

(u) 30 & 31 Vict., cap. 97.

CHAPTER LVI. assumed; and such deed of assumption shall also be effectual as an assignation in favour of such existing and assumed trustees of the whole personal property belonging to the trust-estate; and in the event of any trustee acting under any trust-deed being insane, or incapable of acting by reason of physical or mental disability, or by continuous absence from the United Kingdom for a period of six calendar months or upwards, such deed of assumption may be executed by the remaining trustee or trustees acting under such trust-deed: Provided that when the signatures of a quorum of trustees cannot be obtained it shall be necessary to obtain the consent of the Court to such deed of assumption on application either by the acting trustee or trustees, or by any one or more of the beneficiaries under the trust-deed.”(v) Section 13 of the same Statute provides that “trustees appointed by the Court shall not have the power of assuming new trustees, unless such power is expressly conferred upon them by the Court.”

Election of new trustees of public trusts may be vested in corporation, beneficiary, or in the Court.

1793. In trusts of lengthened endurance, it is not unusual to make provision for continuing the trust by other means than by a power of assumption given to the trustees themselves. Allusion has already been made to the vesting of trust property in corporations, or in public officers and their successors. Another mode of continuing trusts is by giving a power of nomination to the beneficiary, or to some neutral party. Where property is destined to the use of a religious association, or to augment a charitable fund, the nomination of new trustees may be intrusted to the members or office-bearers of the association. Where the destination is to trustees *nominatim*, whom failing to any person to be nominated by the Court of Session, the Court will not consider themselves bound to appoint a trustee under the powers of the trust-deed; but may, on the application of the parties interested, appoint a judicial factor, with the usual powers.(x) Provisions for the election of trustees in permanent trusts are liberally construed. Thus, where a chapel trust-deed provided in general terms for the election of new trustees, the Court remitted to the male members of the congregation to make an election, and afterwards confirmed the appointment.(y)

Election of new trustees in bankruptcy.

1794. By the 74th section of the Bankruptcy Act (z) the credi-

(v) Under section 12, see § 1808, *infra*.

(x) Pet. *Robertson*, 7 Feb. 1833, 11 Sh. 365.

(y) Pet. *Morison*, 18 Jan. 1834, 12 Sh. 307; 11 March 1834, 12 Sh. 547. Lord Eldon, in deciding *Foley v. Wontner*, 2 Jac. & W. 245, doubted whether vacancies in

chapel trusts could be filled up either by the surviving trustees or by the congregation, if the prescribed period for election had passed; and thought that, in that event, the power of appointment would devolve upon the Court.

(z) 19 & 20 Vict., cap. 79; see §§ 67-76.

tors upon sequestrated estates are entitled to elect a new trustee in the event of a vacancy occurring by retirement or otherwise. And if a trustee, after being elected, refuse to accept, the Court, on an application by petition, will remit to the creditors to elect a successor. (a) In voluntary trust-deeds for behoof of creditors, it is usual to provide for the continuance of the trust by empowering the creditors to elect a new trustee, if necessary. If it is intended to substitute the newly-elected trustee in the place of the original trustee, the object will be attained by a deed of devolution executed by the latter in favour of his successor. An example of this sort of arrangement, and of the methods pursued for explicating the trust, will be found in the report of the case of *Earl of Lauderdale v. Earl of Fife*. (b) While it is certainly a most judicious arrangement in trusts for creditors, as well as in trusts to hold property for associations, etc., to vest the power of changing the trustees in the constituents, we cannot recommend the system as one that is suitable in testamentary or family trusts. Most gentlemen would be chary about undertaking a trust, if they knew that they were liable at any time to have new trustees associated with them at the pleasure of the beneficiaries, without regard to their own wishes, or to the probability of their being able to co-operate with the new trustees. The method of assumption by the trustees themselves is the one most likely to be agreeable to the trustees, and to secure responsibility.

1795. In *Lindsay v. Lindsay* (c) all the trustees under an antenuptial contract having failed by death or resignation, and an application having been made to the Court by the spouses and their children for an appointment of new trustees, it was suggested by Lord J.-C. Hope that a sufficient radical right remained in the trusters to entitle them to make a nomination of new trustees themselves. An action of declarator was accordingly raised, at the instance of Mr and Mrs Lindsay against their children, for that purpose; and the case having been reported to the Inner-House, their Lordships found and declared that the pursuers had power, and were entitled, to make a nomination and appointment of new trustees, with all the powers, privileges, rights, and faculties conferred upon the original trustees by the contract of marriage libelled

In marriage-contract trusts, the spouses may appoint new trustees.

(a) Pet. *Mitchell*, 28 Jan. 1860, 22 D. 632.

(b) *Earl of Lauderdale v. Earl of Fife*, 9 March 1830, 8 Sh. 675.

(c) *Lindsay v. Lindsay*, 19 June 1847, 9 D. 1297; *Scott v. Wilson*, 1773, M. 6585, Hailes, 528; *Tovey v. Tennent*, *infra*. In

the case of *Wilson*, petr., 2 July 1864, 2 Macph. 1304, it was held that the right of appointment was not exhausted by the nomination under a power of appointment of certain trustees who declined to accept the office.

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on. In this case the radical right of the husband extended no further than to the administrative part of the trust, the duties of the trustees being to hold heritable property for behoof of the spouses, and ultimately to convey the fee to the wife and her heirs. In a later case, where a trustee and *sine qua non* under a marriage-contract had declined to accept, a declarator was brought to have it found that the pursuers had power, and were entitled, to make a nomination and appointment of new trustees under the contract. The First Division, *causa cognita*, and “in respect of the case of *Lindsay*,” decerned as craved.(d) As it is now settled that the parties to a marriage-contract have power to nominate new trustees, it can scarcely be necessary in future to resort to the machinery of a declarator for the purpose of having the power ascertained.

Continuity in the trust does not import continuity of title in the trustees.

1796. In whatever form an assumption of trustees is made there is still a continuing trust as regards administration and the interests of the beneficiaries. The new trustees are bound to render an account of the intromissions of their predecessors as well as of their own.(e) As regards their *title*, the new body of trustees is distinct from the old, to whom they stand in the relation of singular successors. In *Martin v. Wight* it was argued that the infestment of assumed trustees accresced to and validated precepts granted by their predecessors—who had all failed—in the character of superiors. But this doctrine, founded on a supposed analogy between trusts and corporations, was repudiated by all the judges of the First Division.(f) Lord President Hope and Lord Fullerton considered that if any one of the trustees who had signed the precept had survived, and had been included in the infestment of the new trustees, there would have been considerable difficulty in the question. Lord Mackenzie thought that there might be continuity of title in trusts established by Act of Parliament or Royal Charter, though not in private trusts. The opinions in this case exhibit in a clear light the distinctions between corporations and trusts. As regards the duration of their office, the presumption is, that the trust is meant to continue in the persons of assumed trustees, notwithstanding the failure of all the original trustees; and this construction was accordingly given to a deed which gave power to the trustees to assume others to act along with them.(g)

(d) *Tovey v. Tennent*, 11 March 1854, 16 D. 866.

(e) *Somerville's Trs. v. Wemess*, 8 Dec. 1854, 17 D. 151. No opinion was expressed as to liability for previous intromissions.

(f) *Martin v. Wight*, 3 Feb. 1841, 3 D. 485.

(g) *M'Leish's Trs. v. M'Leish*, 25 May 1841, 3 D. 914, per Lords Medwyn and Moncreiff.

SECTION II.

APPOINTMENT OF TRUSTEES BY THE COURT.

1797. Probably no matter connected with the administration of trust-estates is more involved in doubt than that of the power of the Court of Session to appoint new trustees. Our opinion is that the Court of Session does possess the power; though we believe we give expression to the prevailing opinion amongst the profession, in affirming that the Court has used a wise discretion in declining to bring this branch of this extraordinary jurisdiction into use for the purpose of providing for the administration of ordinary family trusts; seeing that by the machinery of a factory their Lordships' powers of supervision over trust-estates may be exerted more efficiently and in a more summary manner.^(h)

Whether the Court of Session has the power of appointing new trustees at common law.

1798. In arriving at this conclusion, we do not attach much weight to the authority of some early cases, decided at a time when the distinction between trusts and factories was perhaps not very clearly defined. We may refer, however, to the case of *King's College, Aberdeen*, where the Court authorised the investment of the fund in the name of the masters of the College, the said masters and their heirs conjunctly and severally being bound to report their proceedings to the Court within six months.⁽ⁱ⁾ In *Macdowall v. Macdowal*,^(k) where the Court refused a prayer for authority to carry on a private trust, on the ground that the purposes had been already fulfilled, it was observed,—and this *dictum* is referred to by Lord Brougham in the subsequent case of *Miller v. Black's Trs.*,—that the Court would interpose where no person had any immediate interest in the management; and estates destined to charitable uses were mentioned as an instance in point.

Early cases, how far authoritative.

1799. The next reported case is that of *Marjoribanks* in 1822, where an application was made for the appointment of additional trustees for the management of a fund bequeathed for the support of schools. As it appeared that, although some of the original trustees had died, there was still a plurality of trustees, the petition was refused *in hoc statu*.^(l) In the case of *Moir* the Court declined to nominate a trustee on the decease of one appointed by a private trust-deed, being of opinion “that although in cases where there

Authorities in support of the jurisdiction.

^(h) 1 Bell's Com., 5th ed., p. 31; Pr. 2 1993, 2.

^(k) *Macdowall v. Macdowal*, 1789, M. 7453.

⁽ⁱ⁾ *King's College of Aberdeen*, 1741, Elch. “Trust,” No. 11; “Jurisdiction,” No. 21; *Hospital of Largs v. Earl of Wemyss*, M. 14,722; Pet. *M'Pherson*, M. 6052.

^(l) Pet. *Marjoribanks*, 27 Feb. 1822, 1 Sh. 355, N. E. 323.

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was an absolute necessity for their interference, the Court would appoint a trustee, there did not exist such necessity here.”(m) And on the failure of the trustees under a mortification, the Court appointed the kirk-session of the parish “factors to execute the will,” they having offered to act as trustees, provided an allowance were made to their clerk for his services in managing the fund.(n) Still later, the Court, on the authority of an unreported case, remitted to the members of a congregation to elect trustees for holding the property of their chapel, the provisions for a substitution of new trustees under the trust-deed having become inapplicable. On the election being reported to the Court, they confirmed it, and granted warrant to the surviving trustee to execute all necessary deeds for vesting the property in the new body.(o) It will be observed that this was, in point of law, an appointment of trustees by the Court, although the suggestion of the individuals whose election was approved of was naturally left to the congregation.

Miller v. Black's Trs.

1800. In the case of *Miller v. Black's Trs.* there was a destination to trustees for charitable uses; and it was argued that the heir-at-law was entitled to defeat the settlement, on the ground that there were no means of continuing the trust beyond the lives of the *original* trustees, and of such persons as they might assume. The power of distribution being of a discretionary nature, could not, it was said, be exercised by a judicial factor. Lord Brougham, in delivering judgment, explained that the powers of assumption might be extended by implication to the new trustees, and added, “But there is a sufficient power in the Court of Session to provide for continuing the trust, in a case of this description, had there been no such clause;” a doctrine which his Lordship enforced by a careful review of the previous cases.(p)

Melville v. Baird Preston.

1801. The question of jurisdiction was very fully considered in the case of *Melville v. Lady Baird Preston.*(q) The truster in this case had executed an entail of his heritable estates; and by a relative trust-deed he declared that the beneficial operation of this entail should be suspended during the lives of his three nieces, during which period the property was to be administered and the rents to be applied in fulfilment of the purposes of the trust. The trust-deed contained a general disposition of the truster's heritable estate, and gave large discretionary powers to the trustees, includ-

(m) Pet. *Moir and Others*, 6 July 1826, 4 Sh. 801, N. E. 808.

(n) Pet. *Falconer*, 4 Dec. 1830, 9 Sh. 142.

(o) Pet. *Morison*, 18 Jan. 1834, and 11 March 1834, 12 Sh. 807 and 547.

(p) *Miller and Ors. v. Black's Trs.*, 14 July 1837, 2 S. & M'L. 889, affirming 14 Sh. 555.

(q) *Melville v. Lady Baird Preston*, 8 Feb. 1838, 16 Sh. 457.

ing a power to fit up the mansion-house for the heirs of entail, with furniture and plate "according to their own discretion," and also a direction to hold a sum of £10,000 at the pleasure of his three nieces, and the survivor of them, to be laid out in improvements. The trustees declined to accept; and certain of the beneficiaries, conceiving that the entails were merely burdens on the trust—as was afterwards decided by the Court—petitioned for the appointment of new trustees. The Court nominated and appointed the parties suggested "to be trustees for executing the different powers, and carrying into effect the provisions contained in the trust-disposition and deed of settlement and will" of Sir Robert Preston, "and that in room and place of the trustees named by the said Sir Robert Preston, who have declined to accept, and with all the powers and faculties conferred upon the said original trustees by the said trust-deed." The new trustees having brought a formal process of declarator for having the heritable property vested in their persons, the action was opposed by Lady Baird Preston on the ground that the Court had exceeded its powers in making the appointment, but the defence was unanimously repelled. Lord Gillies said—"If it were necessary to decide it, I am clearly of opinion that we have the power of appointing a trustee where a necessity exists for it, and that it is very useful and beneficial that such a power should exist in this Court." Lord Mackenzie observed—"We have ample power to appoint a trustee wherever a necessity exists for making such an appointment; and there was a necessity for it in this case." Lord Corehouse held, that "the Court have a power to appoint trustees where a case of necessity emerges;" and Lord President Hope, while laying weight, in common with the other judges, on the previously expressed consent of the parties, added—"And the Court could have appointed trustees even without the consent of the parties." In the House of Lords the question seems to have been decided on the ground that the appointment was *res judicata* between the parties, the proceedings under the original petition not having been opened up by reduction or appeal. Lord Cottenham, C., said that he thought it unnecessary to consider whether the Court of Session had power to appoint new trustees, because in this case the pursuers had been appointed trustees with the consent of the appellant, and the appointment, he said, "stands in full force, and whilst it so stands the title of the pursuers under it cannot be disputed by the appellant." (r)

1802. The later cases, which are considered to have thrown doubt on the authority of *Preston's* case, appear to us to leave the

(r) *Preston v. Melville*, 8 Cl. & Fin. p. 16, 2 Rob. 45.

Authority of *Preston's* case recognised in the cases of *M'Aslan* and *Lindsay*.

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principle untouched; the question raised in these cases having had relation merely to the expediency of appointing trustees under private trust-settlements. In the case of *M'Aslan*, the First Division, with consent of the beneficiaries, appointed trustees, with the whole powers contained in the trust-disposition; the original trustees having all died, and it being represented that the purposes of the trust were such as to render it one of considerable endurance.^(s) And, in a trust for behoof of married persons and their children, the Court, on the death of the original trustees, appointed new trustees under the disposition, "with the whole powers thereby conferred on the original trustees now deceased, they always finding caution before extract, in terms of the Act of Sederunt anent factors."^(t) But where the only obstacle to the termination of a family trust was the existence of an annuity, the Court refused to appoint trustees; Lord President Boyle observing—"We are not fond of appointing trustees. We have no good securities that the work will be well done; and in this case I propose that the party should only be nominated judicial factor, with the usual powers."^(u) In *Lindsay's* case, which was a marriage-contract trust, Lord Cockburn said—"Assuming that we have power to nominate new trustees, it would require a strong case to make us exercise it; and a strong case cannot be said to exist where the parties can do it for themselves."^(x) In another case,^(y) on the failure of trustees appointed by a marriage-contract, the First Division declined to appoint new trustees on the application of one of the spouses, but nominated a judicial factor.

Jurisdiction to appoint trustees for the management of charities.

1803. In *Ferguson v. Marjoribanks* the Court were asked to find that "it is competent for our said Lords to nominate and appoint such and so many persons as to them shall appear fit and proper" for the administration of an endowment of a grammar school. The Court held that the original nomination of certain parties and their heirs had not failed, and the action was accordingly dismissed as unnecessary; the only indication of opinion on the merits being an observation of Lord Ivory, to the effect that the Court of Session is itself the trustee when a trust has lapsed, and as such, assumes the right of appointing a judicial factor.^(z) The difficulties attending the appointment of trustees were also alluded to by Lord Deas in a petition founded on an antenuptial contract, and praying for the appointment of a judicial

^(s) Pet. *M'Aslan and Others*, 17 July 1841, 3 D. 1263.

^(t) Pet. *Glasgow*, 5 Dec. 1844, 7 D. 178.

^(u) Pet. *Bain*, 30 June 1846, 8 D. 942.

^(x) *Lindsay and Spouse v. Lindsay*, 19 June 1847, 9 D. 1297. *Supra*, § 1795.

^(y) Pet. *Nicholson*, 29 Jan. 1850, 12 D. 911.

^(z) *Ferguson v. Marjoribanks*, 1 April 1858, 15 D. 645.

factor to hold a sum of £3000, which the lady's father had become bound to pay at the first term after his death, for behoof of the spouses in liferent and the children in fee. No trustee, however, had been nominated in the contract, and the executor could not secure the children's interest except through the intervention of a trust. The Court declined to name a trustee, but appointed a judicial factor with the usual powers.(a)

1804. The ground of the refusal to appoint, in the sequel of *Preston's* case, deserves attention, from its bearing on cases as to charitable administration. The Court, having already appointed trustees with all the powers and faculties conferred by the truster, including the power of assumption, refused an application for the appointment of a new trustee to supply a vacancy, on the ground, as stated by the Lord President M'Neill,(b) that the surviving trustees nominated by the Court might exercise the power of assumption, and that no reason had been stated for seeking the intervention of the Court. This consideration obviously suggests a reason for the appointment of new trustees rather than a factor in trusts of lengthened endurance, *e.g.*, for charitable purposes. By appointing trustees, the trust is saved the expense of a salaried management; and the trustees may at the same time be enabled, under the powers of the decree of constitution, to transmit their office to successors, instead of leaving it, as a factor must do, to be filled up, as accident might direct, by any one who cared to make the necessary application to the Court. We refer to a subsequent chapter for a statement of the more recent cases in which the Court has appointed trustees, under the name of managers, for the execution of charitable trusts.(c)

Court may confer the power of assumption.

Recent authorities.

1805. The observation of the Lord President in *Preston v. Preston's Trs.*, as to the course which might be taken in the event of one of two trustees leaving the country,(d) leads us, in conclusion, to the consideration of a class of cases in which the Court has empowered trustees to execute the trust alone, in consequence of the death or non-residence of other trustees. The Court has the power of appointing an additional trustee to act along with an original trustee whose colleague has become incapable of acting. This course seems preferable to that of appointing a factor, on the principle laid down in *Findlay's* case,(e) of paying respect to the nomination of the truster; but we cannot point to any case in which the Court has exercised the power of nominating additional trustees.

Jurisdiction of the Court to grant powers to diminished number of trustees;

(a) Pet. *Melville*, 8 Mar. 1856, 18 D. 788.

(b) Lord Colonsay, 14 D. 1056.

(c) Chapter 66, sect. 4.

(d) *Preston v. Preston's Trs.*, 14 D. 1056.

(e) Pet. *Findlay and Ors.*, 30 June 1855, 17 D. 1014.

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in cases of insanity ;

bankruptcy ;

or absence of trustee from the country.

Specialty, where the trust is discretionary.

The actual course of practice has not been uniform. In one case, where the trust-settlement was conceived in favour of trustees and the survivor, and one of two surviving trustees became insane, the First Division granted warrant to and authorised the petitioner (the acting trustee) to bring the trust to a conclusion, as sole trustee capable of acting therein, and to act with the full powers and for the purposes expressed in the trust-deed, caution being duly found ;(f) and again, where one of three trustees had died, and another was sequestrated and refused his concurrence to the execution of a trust, the First Division, agreeably to their former decision, authorised the third trustee to wind up the trust, with the full powers conferred on the trustees or survivor, on condition of his finding caution.(g) But, in a similar case, where an assumed trustee prayed the Court either to nominate a new trustee to act along with her in place of an incapable trustee, or otherwise to authorise the petitioner to execute by herself the purposes of the trust, the Second Division refused the prayer ; and Lord Justice-Clerk Hope observed—"The Court are here called upon to exercise an extraordinary power where it is quite unnecessary. The appointment of a new trustee, I am aware, is a thing which has been done, but it is most inexpedient and unadvisable." A factor was afterwards appointed in terms of an amended prayer to that effect.(h)

1806. Where the difficulty arises from a trustee having gone abroad, we have seen that the remaining trustee has been held entitled to act alone to the effect of assuming a colleague in the trust ;(i) but in a later case, in which the authority of the resident trustee was doubted, the Court appointed a judicial factor.(k) In the earlier case of *Cowan v. Crawford*, it was ruled that where the beneficiaries had an interest to support the administration, it was not to be considered as dissolved even by the death of one trustee, the absence of another from the country—to whom a *curator bonis* (*loco absentis*) had been appointed—and the bankruptcy of the third. The absent trustee might still return and claim the administration, as he had never been superseded or debarred from exercising his office.(l) The Court will not readily appoint a new trustee, or authorise one of several trustees to act alone, where discretionary powers are to be exercised.(m)

(f) Pet. *Fraser*, 1 March 1837, 15 Sh. 692.

(g) Pet. *Millar*, 19 Jan. 1854, 16 D. 358.

(h) Pet. *Watt*, 18 June 1854, 16 D. 942.

(i) *Watson v. Craocour*, 17 Feb. 1844, 6 D. 687. But see the more recent cases cited in § 1790.

(k) *Lauder v. Lauder's Trs.*, 12 Nov. 1851, 14 D. 14.

(l) *Cowan v. Crawford*, 20 Jan. 1837, 15 Sh. 898.

(m) Bell's Pr. § 1998, 2 ; *Ireland v. Glass*, 18 May 1838, 11 Sh. 626 ; *Nisbet v. Fraser*, 31 Jan. 1835, 13 Sh. 384.

1807. The appointment of trustees by the Court is now regulated by the Trusts (Scotland) Act 1867.⁽ⁿ⁾ Section 12 enacts, that “When trustees cannot be assumed under any trust-deed, or when any person who is the sole trustee acting under any such trust-deed has become insane, or incapable of acting by reason of physical or mental disability, the Court may, upon the application of any party having interest in the trust-estate, after such intimation and inquiry as may be thought necessary, appoint a trustee or trustees under such trust-deed, with all the powers incident to that office; and on such appointment being made, in the case of any person becoming insane or incapable of acting as aforesaid, such person shall cease to be a trustee under such trust-deed; and the Court may on such application grant a warrant to complete a title to any heritable property forming part of the trust-estate in favour of the trustee or trustees so appointed, which warrant shall specify and describe the heritable property to which it is applicable, and shall also specify the moveable or personal property, or bear reference to an inventory appended to the petition to the Court in which such moveable or personal property is specified; and such warrant shall be effectual as a conveyance of such heritable property in favour of the trustee or trustees so appointed, in like manner and to the same effect as a warrant in favour of a judicial factor granted under the authority of the thirty-eighth section of ‘The Titles to Land (Scotland) Act 1860,’ and shall also be effectual as an assignation of such moveable or personal property in favour of the trustee or trustees so appointed.” By section 13 it is declared that trustees appointed by the Court shall not have the power of assuming new trustees, unless such power is expressly conferred upon them by the Court.

CHAPTER LVI.

Appointment of new trustees by the Court under the Trusts Act.

1808. Some special provisions with reference to charitable institutions are contained in section 16, which provides, “That when, in the exercise of the powers pertaining to the Court of appointing trustees and regulating trusts, it shall be necessary to settle a scheme for the administration of any charitable or other permanent endowment, the Lord Ordinary shall, after preparing such scheme, report to one of the Divisions of the Court, by whom the same shall be finally adjusted and settled; and in all cases where it shall be necessary to settle any such scheme, intimation shall be made to Her Majesty’s Advocate, who shall be entitled to appear and intervene for the interests of the charity or any object of the trust, or the public interest.”

Proviso in relation to charitable trusts.

(n) 30 & 31 Vict., cap. 97, sect. 12. This enactment applies to the case of a lapsed trust; *Zoller, Petr.*, 11 March 1868. See § 1817, *infra*.

CHAPTER LVI.

SECTION III.

RESIGNATION OF TRUSTEES.

How a power to resign may be constituted.

1809. To complete the subject of the devolution of the office of trustee, we have to consider the mode in which an individual may divest himself of the character of trustee without thereby putting an end to the trust. Three different means have been distinguished by which this object may be attained: *First*, the trustee may resign of consent of all parties interested; *secondly*, he may resign by virtue of a special power contained in the instrument creating the trust; *thirdly*, he may obtain a discharge by an application to the Court on proper cause shown. To these sources of authority we must now add, *fourthly*, the authority of Statute. It will afterwards be seen that the interposition of the Court of Session, for the purpose of liberating a trustee from his engagements, is a remedy more sparingly granted by the Court of Session than by the Court of Chancery.

At common law a trustee cannot resign his office.

1810. At common law, a trustee, unless acting under special powers to that effect, was not allowed to resign his office, even upon reasonable grounds. In the case of *Watson v. Craucour*, indeed, permanent residence in a foreign country was regarded as equivalent to resignation. But the report shows that, in deciding the point, the judges were desirous of putting that construction upon the trustee's absence which would be attended with least disadvantage to the estate; and in the case in question, it was necessary to hold him as having resigned, in order that the resident trustee might have liberty to act by himself. At most, this case only shows that the Court has power to supersede an absent trustee, or to hold him as having *de facto* resigned; it does not warrant the conclusion that a trustee might escape responsibility for the future management of the trust by merely quitting the country, without being regularly discharged of his trust.

Resignation competent with the consent of the beneficiary.

1811. (1) As it would be contrary to equity to allow a beneficiary to complain of the consequences of an act to which he was an assenting party, it follows, that where all the beneficiaries are *sui juris*,^(o) and all concur in sanctioning the resignation of a trust-

(o) In *Wilkinson v. Parry*, 4 Russ. 272, the trustees were bound by the deed, if they relinquished the trust, to transfer the property to the joint names of a *new trustee* and the continuing trustee; and one of the trustees having retired without procuring the appointment of a successor, Sir J.

Leach, M.-R., held him responsible for the misuse of the trust-funds; although it appeared that the widow and such of the family as were major had assented to the arrangement. "Nothing could relieve the trustee," said the M.-R., "from his obligation, but the consent of all parties in-

tee, he may retire without involving either himself or his colleagues in any new responsibility. But in giving their consent to the contemplated resignation, beneficiaries will generally wish to be assured that their interests are not likely to suffer by the arrangement. Unless the resignation were effectual against the public as well as against the beneficiaries, it would be worse than useless; because it would leave all the subsequent deeds of the trustees open to challenge, as having been executed without the consent of a legal quorum. It is, therefore, important to observe that the resignation of a trustee, with concurrence of the beneficiaries, is binding on all parties.

1812. Accordingly, in the case of *Hill v. Mitchell*, where one of three trustees had resigned, and his resignation had been accepted by his co-trustees, and thereafter a second trustee resigned and his resignation was accepted by the remaining trustee, who thereupon assumed two new trustees in pursuance of powers conferred, and the whole proceedings were subsequently approved and confirmed by the testator's family, the beneficiaries under the trust; and it was objected, on the part of a purchaser from the new body of trustees, that they were not *in titulo* to sell, the resignation being conceived to be *ultra vires*, because not specially authorised by the trust-deed,—the Court, “in respect of the special circumstances of the present case, and likewise of the ratification and concurrence of all those interested in the trust,” sustained the title.(p). The report of this case does not disclose any “special circumstances,” except that both trustees had a reasonable cause for resigning, the one being in bad health, and the other having differed with his co-trustees. The resignations were made by letter. The opinions of the judges show, that the concurrence of the beneficiaries and of the other trustees was the important circumstance which gave validity to the resignation. Lord Mackenzie, for example, says, “It is said that there must be an application to the Court. No doubt that is the best course. We sustain all kinds of declarators, and a declarator of that sort would be a valid action; but I would hesitate to say that it is absolutely necessary. A resignation made on the one hand, and accepted on the other, or a resignation called for by the other trustees, or by the beneficiaries, and acceptance

interested in the trust. It was not possible to obtain such consent here, because there were infants, who were not capable of consenting, and therefore could not be deprived of that security which they derived from having the trust property confided to the

care of two trustees instead of one;” 4 Russ. 276.

(p) *Hill v. Mitchell & Ors.*, 9 Dec. 1846, 9 D. 239; see also *Freen v. Beveridge*, 29 Nov. 1838, 12 Sh. 141.

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Resignation
under the autho-
rity of the
truster.

made on that call, and the trust going on after the resignation, I don't see why that resignation should not be sustained."(*q*)

1813. (2) The next and most usual mode of enabling a trustee to resign, is by a power to that effect inserted in the trust-deed. By the Trustee Act 1861(*r*) every private trust-deed, unless where the contrary is expressed, is, for the future, to be held to include a power of resignation. Express powers are usually coupled with provisions for enabling the surviving or continuing trustees to substitute new trustees in room of those who may die, or resign, or become incapable of acting; and the right to resign is sometimes made contingent on the consent of the other trustees being obtained. Where such a power is given, the trustee may resign even after an action has been brought against him; and he is entitled to be assolzied in respect of his resignation, if he found upon it in his defences.(*s*) In practice, it is by no means uncommon for a trustee to retire during the continuance of a trust, when such retirement is authorised by the deed of constitution.

Court may
grant authority
to resign in
cases of neces-
sity.

1814. (3) If a trustee has not received the necessary authority from his constituent, and is unable to obtain the consent of all the beneficiaries to his resignation, he will be allowed to retire, on cause shown, upon application to the Court of Session. This doctrine, which was first distinctly laid down in the case of *Hill v. Mitchell*, has been more recently acted on by the First Division in the case of *Gordon*, Petr.,(*t*) and by the Second Division in *Dick's Trs. v. Pridie*.(*u*) In the latter case the Court pronounced an interlocutor finding "that, in the circumstances stated in the said report, as to the state of health of the defender, Peter Hampden Pridie, he is entitled to be relieved from the office of trustee under the trust-deed and settlement of the late Mrs Jean Dick, and therefore discharge and exoner him of the said office," etc. In *Gordon's* case the application was by petition, stating that the applicant, who was an assumed trustee, had gone to reside in England, and was desirous of resigning his office; and praying for authority to that effect and for exoneration. Intimation having been made to the trustees,(*x*) the Court, "in respect no answers to the petition had been lodged, allowed the petitioner to resign."

(*q*) 9 D. 244. Where a trustee has become a party to a litigation, he cannot withdraw without the consent of the opposite party, although the beneficiary is willing to be substituted in his place; *Stephenson's Trs. v. Marq. of Tweeddale*, 11 March 1823, 2 Sh. 287, N. E. 252.

(*r*) 24 and 25 Vict., cap. 84, § 1; see 26 and 27 Vict., cap. 115.

(*s*) *Gilmour v. Gilmour's Trs.*, 7 Feb. 1852, 14 D. 454.

(*t*) Pet. *Gordon*, 2 June 1854, 16 D. 884.

(*u*) *Dick's Trs. v. Pridie*, 9 June 1855, 17 D. 885.

(*x*) Intimation to the beneficiaries was afterwards directed.

1815. As regards the circumstances and grounds which entitle a trustee to be judicially discharged of his office, it is understood that the practice in England is more favourable towards trustees than that which the theory of our law is supposed to sanction. The doctrine of the law of England was thus explained by Lord Romilly, M.-R. :—" It is quite clear that any circumstances arising in the administration of the trust which have altered the nature of his duties, justify a trustee in leaving it, and entitle him to receive his costs ; but the circumstances must be such as arise out of the administration of the trust, and not those relating to himself individually." (y) Now, it is extremely doubtful whether an unexpected alteration in the nature of the duties undertaken by a trustee in Scotland would be held to entitle the Court to relieve him of the *onus*. On the other hand, the cases of *Dick v. Pridie* and *Gordon*, just cited, rather tend to show that changes in the position of the trustee himself, such as ill-health or non-residence, unfitting him for the performance of the trust, would entitle him to obtain his discharge ; and, contrary to the English rule, he would seem to be entitled to have it at the expense of the trust-estate.

In what circumstances such authority is granted.

1816. (4) A trustee may now resign under the powers conferred by 24 & 25 Vict., cap. 84, which, as interpreted by decisions (z) and by the explanatory Act of 26 & 27 Vict., cap. 115, applies to all trusts in operation after the passing of the Act, although constituted by deeds of trust executed and coming into operation prior to its date. (a)

Resignation under the powers of the Trustee Act.

1817. By Section 10 of the Trusts Act 1867, (b) " Any trustee entitled to resign his office may do so by minute of the trust entered in the sederunt book of the trust, and signed in such sederunt book by such trustee and by the other trustee or trustees acting at the time, or he may do so by signing a minute of resignation in the form of the schedule (A) to this Act annexed, or to the like effect, and may register the same in the books of Council and Session, and in such case he shall be bound to intimate the same to his co-trustee

Form of resignation of trustees under Trusts Act 1867.

(y) *Forshaw v. Higginson*, 20 Beav. 486. In *Courtenay v. Courtenay*, 3 J. & Lat. 533, the Lord Chancellor of Ireland (Sir E. Sugden) observed : A trustee applying for authority to resign was not bound to show that another person was ready to accept the office ; but that, if no one could be found to accept the trust, the Court might be obliged to retain the old trustee, but would take care to protect him.

(z) *Reid*, Pet., 20 March 1863, 1 Macph. 774.

(a) On the question whether the resign-

ation of a trustee may be withdrawn while *res sunt integræ*, see *Blair's Trs. v. Blair*, 12 Dec. 1863, 2 Macph. 284.

(b) 30 & 31 Vict., cap. 97. By section 2, trustees are generally empowered to discharge any of their number who have resigned, and the representatives of trustees who have died ; and by section 9, provision is made for the judicial exoneration in a summary form of trustees or the representatives of trustees who have died or resigned, and who are unable to obtain an extrajudicial discharge.

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or trustees, and the resignation shall be held to take effect from and after the expiry of one calendar month after the date of such intimation, or the last date thereof if more than one, if the trustee or trustees to whom such intimation was given is within *Scotland*, or otherwise within three months from and after that date; and in case, after inquiry, the residence of any trustee to whom intimation should be given under this provision cannot be found, such intimation shall be given edictally in usual form, and the resignation in that case shall be held to take effect from and after the expiry of six months: and if any trustee entitled to resign his office is at the time sole trustee, he shall not be entitled to resign until, with the consent of the beneficiaries under the trust, of full age and capable of acting at the time, he shall have assumed new trustees, who shall have declared their acceptance of office; or he may apply to the Court, stating his wish to resign and praying for the appointment of new trustees or of a judicial factor to administer the trust; and the Court, after intimation to the beneficiaries under the trust, or such of them as the Court may direct, shall thereafter either appoint a judicial factor, or, on the application of the beneficiaries or any of them, may appoint trustees in the same manner as is provided under the twelfth section of this Act; and after such appointment either of judicial factor or of trustees, the petitioning trustee will be entitled to resign; and any retiring trustee or trustees who may have already retired shall be bound, when required, and at the expense of the trust, to execute all deeds necessary for divesting them of trust property, conveying the same to the trustees or trustee or judicial factor acting in the execution of the trust."

Resignation of trustee who is also executor.

1818. By Section 18 of the same Statute it is enacted, that "in all cases where a trust-deed appoints the trustees to be also executors, the resignation of any such trustee shall infer, unless where otherwise expressly declared, his resignation also as an executor under such trust-deed." But by Section 1 an exception is admitted in the case of a trustee receiving a remunerative legacy, it being thereby provided "that no trustee to whom any legacy or bequest or annuity is expressly given on condition of the recipient thereof accepting the office of trustee under the trust, shall be entitled to resign the office of trustee by virtue of this or of the said recited Acts, unless otherwise expressly declared in the trust-deed."

CHAPTER LVII.

COMPLETION OF THE TRUSTEE'S TITLE TO
THE ESTATE.

1819. In order that a trust-conveyance of heritable property may be rendered effectual, the estate must be vested either in the whole body of the trustees, or in some of their number, to be held subject to the acts and directions of the others.^(a) As regards trusts of heritable estate, the title of the trustee may be said to be complete when he has taken infeftment by registration of the trust-conveyance or other document of title. If the lands have been specially conveyed, nothing more is requisite than the registration of the trust-deed, or of such parts of it, including the description of the lands, as may be specified in a clause of direction under the provisions of the Titles to Land Acts 1858 and 1860.^(b) If the deed contain no clause of direction, and it is desired to prevent the trust purposes entering the record, a notarial instrument may be executed and registered in terms of the immediately preceding sections. In completing a title to lands acquired under a general trust-conveyance, recourse is had either to the old form of adjudication in implement,^(c) or—whether the truster held under a feudal^(d) or a personal title^(e)—to a notarial instrument under sections 12 and 14 of the Titles to Land Act 1858, setting forth the conveyances to the different subjects, and the series of titles, including the general disposition, by which the trustee acquired right to the property. Security titles will be completed either under the Acts of 1858 and 1860, or under the corresponding provisions of the Acts 8 and 9 Vict., cap. 31,^(f) and 10 and 11 Vict., cap. 50.^(g)

Completion of
trustee's title
under the Titles
to Land Acts.

(a) Bell's Pr. § 1994; 1 Com., 5th ed., p. 34.

(b) 21 & 22 Vict., cap. 76, § 3; 23 & 24 Vict., cap. 143, § 5.

(c) The conclusions for constitution and adjudication may be combined in one summons, whether the heir renounce or not. See 21 & 22 Vict., c. 76, § 27; 23 & 24 Vict., c. 143, § 16.

(d) See § 12, Act of 1858, as to notarial instruments upon general conveyances of lands in which the granter was infeft, and § 8, Act of 1860.

(e) 21 & 22 Vict., cap. 76, § 14; 23 & 24 Vict., cap. 143, § 10.

(f) See §§ 4, 5, and 6.

(g) See § 10.

CHAPTER LVII.

Effect of the completion of the trustee's title.

Completion of title where the trustee's title is *ex facie* absolute

1820. If the trust is an express condition of the conveyance, the property is secure against the diligence of the trustee's creditors, whether the conveyance is recorded or not. (*h*) But where the declaration of trust is embodied in a separate unrecorded back-bond, such declaration is an effectual qualification of the trustee's title, only so long as the title continues personal. If, therefore, it is intended that the trustee's right should be made real by recording the conveyance in his favour, the declaration or back-bond should also be recorded in the Register of 'Sasines and Reversions;' otherwise the beneficiary will have no security over the estate. (*i*)

1821. Where property is vested by *ex facie* absolute disposition in a trustee for behoof of the truster's creditors, it is a question of expediency whether the trustee should be required to complete a title in his person. In the prospect of the estate turning out insolvent, it would be desirable that the trustee should take infestment for the purpose of preventing the acquisition of preferences by adjudgers. But in the case of a private trust for sale by a solvent proprietor, the completion of a title by infestment is to be avoided, especially if the trust is likely to be continued for some time. Infestment on an *ex facie* absolute disposition puts the property within the power of the trustee's personal creditors; and this risk, which attaches of necessity to all recorded *ex facie* absolute conveyances, is obviated by leaving the trustee's title to the lands personal upon the trust-disposition. The preferable course is, that the disposition should be declared to be *in trust* for purposes which may be specified in a separate writing. In this way only are the creditors of the trustee excluded under all circumstances. (*k*) The

(*h*) See also the provisions of 30 & 81 Vict., cap. 97, § 11, as to the completion of titles by assumed trustees by deed of assumption in the form scheduled, and of § 12, as to the completion of titles by trustees appointed by the Court.

(*i*) Stat. 1617, cap. 16; *Keith v. Maxwell*, 1795, Bell's Fol. Ca. 234.

(*k*) "Where," says Bell, "the conveyance of the estate is expressly a *disposition in trust*, for certain uses and purposes, and the precept and procuratory are so conceived, the completion of the title in the person of the trustee by sasine, recorded with its condition, while it vests the fee in him, leaves to the person for whose behoof it is intended an effectual and secure estate, or *jus crediti* as a real burden on the trust-estate. The consequences of this are important: 1. The creditors of the trustee have no right to attach the trust-

estate for the trustee's debts. The estate in him is, in its nature and origin, a limited and qualified estate; it is, in regard to his own creditors, a mere formal right,—a deposit for the benefit of others; and the estate in all its forms, and even the proceeds of it, if sold, while they can be identified (as bills or bonds of the purchaser, lands exchanged or excambed for the original trust-estate, etc.), belong exclusively to those having right under the trust, and can neither be attached nor divided by the trustee's creditors. 2. The maxim of law, that a fee cannot be *in pendente*, is satisfied by the vesting of the estate in the trustee; so that for persons yet unborn, or otherwise incapable of holding the fee, an effectual contingent right may be constituted in the meanwhile, which in due time may be completely available;" 1 Com., 5th ed., p. 34; and see Pr. § 1994.

completion of titles by trustees upon sequestrated estates, and liquidators of joint-stock companies, is regulated by the 22d and 15th sections of the Acts of 1858 and 1860 respectively, and, in the case of judicial factors, etc., by the 38th section of the Act of 1860.

CHAPTER LVII.

Trustees in
bankruptcy or
liquidators.

1822. By the 13 & 14 Vict., cap. 13, as extended by 23 and 24 Vict., cap. 143, sect. 32,^(l) provision is made for vesting heritable estate in trustees for the maintenance, support, or endowment of ministers of religion, missionaries, or schoolmasters, or for the maintenance of the fabric of churches, chapels, meeting-houses, or other places of worship, or of manse or dwelling-houses, or offices, for ministers of the Gospel, or of school-houses or schoolmasters' houses, or otherlike buildings, in such a form as to confer upon the trustees the right of perpetual succession, and to obviate the necessity of renewing the investiture when the trust devolves upon successors. These provisions are applicable to feu-duties, heritable securities and other heritable property, as well as to lands and houses.^(m) §§ 1 and 3 of the Act of 13 & 14 Victoria provide for the vesting of the estate in the trust-disponees and their successors; and by § 2 it is enacted that, unless a special agreement shall have been made with the superior for a periodical payment in lieu of composition, it shall be lawful for the superior, at the death of the existing vassal, and at the expiration of every period of twenty-five years thereafter during the continuance of the trust, to demand from the disponees a sum corresponding to the casualty or composition, which would have been payable upon the entry of a singular successor.

Completion of
titles to pro-
perty of trus-
tees for churches
and schools.

1823. Trust-disponees are liable in payment of composition as singular successors if they enter; although the trust is for the benefit of the heir.⁽ⁿ⁾ But if the heir is willing to enter for the purpose of saving the trustees a year's rent, the superior must receive him.^(o) This rule holds of course *a fortiori*, if the superior has called the heir as a co-defender with the trustees in a declarator of non-entry,^(p) which, it would seem, the superior is bound to do if required by the trustees.^(q) Where property is vested in a corporation for charitable purposes, the title may be taken in name of the corporation, subject to such periodical payment in name of composition as may be agreed upon; or, if the parties do not agree,

Entry and
composition.Completion of
title where trust-
estate vested in
a corporation.

^(l) Provisions of a similar nature have been introduced into the Friendly Societies Consolidation Act, 18 & 19 Vict., cap. 68, §§ 11 and 17.

^(m) 23 & 24 Vict., cap. 143, § 82.

⁽ⁿ⁾ *Grindlay v. Hill*, 18 Jan. 1810, F.C.

^(o) *Piggott v. Colvill*, 9 Dec. 1829, 8 Sh. 218.

^(p) *Hill v. Mackay*, 5 Feb. 1824, 2 Sh. 681, N.E. 574.

^(q) *Mags. of Hamilton v. Hart's Trs.*, 2 Feb. 1854, 16 D. 487.

CHAPTER LVII. the title may be taken in name of a trustee or trustees for behoof of the corporation; in which case the renewal of the investiture will take place in accordance with the ordinary rules of feudal law.^(r)

Singularities
in the title of
trustees.

Case of trustees
deriving their
authority from
a deed of nomin-
ation.

1824. We proceed to inquire how far the ordinary modes of completing a title are susceptible of adaptation to singularities in the title of trustees, connected with the form of their appointment. In all such cases the object of the Court is of course to give effect to the appointment, notwithstanding the omission of words of express conveyance in the deed of settlement; and to avoid the expense of adjudication, the rule has been laid down, that a supplementary appointment shall receive effect in the same manner as if the names of the trustees had been inserted in the original conveyance. The rule, however, is understood in practice to be restricted to the case of settlements executed *intuitu mortis*, as there is nothing in the authorities to warrant its extension to trusts which are intended to take effect during the lifetime of the truster. In the note to his interlocutor in the case of *Mackilligin*,^(s) quoted below, Lord Curriehill observes, that the execution of an instrument containing a formal dispositive clause, while it does not impair the truster's rights of ownership, "in effect enables him thereafter to *test* upon his heritable property in any way he may think proper, by giving directions to his trustees (if the settlement be a trust), or by making such additions to, or alterations or revocations of, his donations as he may think proper, at any future period during his lifetime."^(t) If the trust-estate consist of moveable property, a mere nomination as executor and universal intromitter with the estate will vest the right to the property in the trustee, so as to entitle him to obtain confirmation, which in this case serves to supply the want of a conveyance in his favour. And, on the same principle, the appointment of a party as trustee for the distribution of heritable property previously disposed, will receive effect as a conveyance; the law supplying a fee in the person nominated as trustee, wherever a beneficial interest has been created by trust-disposition.

Mackilligin v.
Mackilligin.

1825. Until the decision in *Mackilligin's* case,^(u) it had been thought, in practice, that an adjudication was necessary, or a conveyance from the trustees first appointed; and it had even been maintained that the nomination of new trustees was an absolute

^(r) See *Hill v. Merchant Co. of Edin.*, 17 Jan. 1815, F.C.; *University of Glasgow v. Hamilton*, 1713, M. 9296, and 15,075, as reversed on appeal, overruling *Church, etc. of Aberdeen v. King's College*, 1712, M. 15,034.

^(s) *Mackilligin & Ors. v. Mackilligin*, 23 Nov. 1855, 18 D. 83.

^(t) 18 D. 87.

^(u) See the arguments in *Mackilligin's* case, *supra*.

nullity as regards the right to heritage, unless accompanied by words importing a conveyance in their favour. This last proposition, however, was evidently untenable; for it had been already ruled, by a unanimous judgment in *Robertson v. Ogilvie's Trs.*,^(x) that a trustee was validly constituted although not named in the dispositive clause of the settlement; a decision which has been confirmed in two later cases.^(y) In *Mackilligin's* case, the terms of the destination to trustees were altered by two codicils, of which the first revoked the appointment of three of the original trustees, and appointed a new trustee to act along with those remaining. The second codicil not only renewed the destination under the former codicil, but revoked all prior nominations, so that none of the trustees could claim to take the estate in virtue of the original disposition. In these circumstances, it was held by Lord Justice-Clerk Hope and Lord Wood, that although the nomination of trustees in the original deed had fallen by the effect of the revocation, yet the dispositive clause operated as an effectual conveyance to all parties who might be afterwards nominated to the office; the names of the trustees subsequently appointed being held to be imported into the original deed, upon which they were accordingly entitled to take infestment directly. The Lord Justice-Clerk observed that a conveyance, although blank in the names of the trustees, might be sustained if the names were afterwards supplied by a codicil. Lord Cowan, on the other hand, held that any such appointment could only receive effect as an obligation to convey, transmitting against the heir of the truster. The more correct view appears to be, that the codicil will vest the property in favour of the new trustees if the original disposition is in favour of trustees specifically named, and *of such as may be thereafter named*. But it is against principle to hold that a disposition *solely* to trustees named should operate as a conveyance to those named in a subsequent codicil; and, in practice, we should think a conveyance from the original trustees or from the heir-at-law a necessary step in the title.

1826. Mistakes or defects of specification in the designation of the trustees will not prevent the estate from vesting, unless the intention is totally obscured. On this subject we refer to a previous chapter on the subject of uncertainty in wills.^(z) A designation of *ex officio* trustees is good, although the individuals holding the offices at the time are not named in the trust-deed. In the

Effect of conveyance to trustees under a *designatio personarum*.

(x) *Robertson v. Ogilvie's Trs.*, 20 Dec. 1844, 7 D. 236.

(y) *Mackilligin, Royal Infirmary v. Lord Adv.*, 23 D. 1218.

(z) Chapter 18.

CHAPTER LVII. case of *Wylie*(a) it was held that there had been a valid appointment of trustees for the management of a charitable fund, where one of the trustees was designed in the settlement as "the proprietor of the lands of Nellfield for the time being." The proprietor being, as it happened, a minor, the Court would not allow the other trustees to act without him, and appointed a judicial factor to administer the trust.

Completion of title where trustees are designated but not named.

1827. A difficulty is sometimes experienced in practice with respect to the mode of making up a title in the persons of trustees who are designated without being named.(b) Sometimes, as in the cases of *Wylie* and *Boe v. Anderson*, there is a general disposition to trustees *nominatim*, upon trust to convey certain subjects, or to pay over a certain sum to persons designated descriptively, as trustees in perpetuity. In such a simple case the investiture will of course be completed by the testamentary trustees conveying to the parties answering to the description, and to their successors, etc. (as in the original destination), upon the narrative that the disponees named and designed are the persons for the time being holding the office or position in question. But where there is a direct conveyance to trustees designed but not mentioned *nominatim*, it may be doubted whether the trustees could take infeftment on the disposition without having first constituted their right by declarator, or having obtained a warrant for infeftment in their own names in an action of declaratory adjudication. In such cases, trustees will naturally be desirous of obtaining the security of a decree in their favour; and it is perhaps right that they should have it. We do not think, however, that any well founded objection would lie to a title by infeftment on the trust-disposition. The trustees, in the case supposed, are properly conditional institutes, the condition being that the person is magistrate (or whatever the office may be) for the time being. Under the old system of conveyances, a notary was entitled to give sasine to a conditional institute, on being satisfied by reasonable evidence of the failure of the disponees named in the first instance.(c) By parity of reasoning, we infer that a trustee nominated descriptively would be entitled to indorse a warrant for registration in his own favour upon the conveyance, which we think would suffice, when executed, to vest the estate in his person.

Completion of a title by the heir of the last surviving trustee.

1828. To complete the subject of the vesting of the legal estate in the trustee, we may now direct attention to the case arising

(a) *Wylie*, Pet., 28 June 1850, 12 D. 1110.

(b) *Wylie*, *supra*; *Boe v. Anderson*, 11 Nov. 1857, 20 D. 11, 7 March 1852.

(c) *Fogo v. Fogo*, 25 Feb. 1840, 2 D. 651.

upon a lapsed trust, with a destination to the heirs of the last surviving trustee. In this case the heir of the surviving trustee is held, as regards both heritable and moveable property, to mean the heir-at-law, who must be called in any action of adjudication at the instance of the beneficiaries, or of a judicial factor.^(d) It would seem that in England a surviving trustee may devise his trust-estates by will; but no such practice has ever been recognised in Scotland; nor would it be attended with any obvious advantage, because the powers of a trustee who succeeds merely in the character of heir to a surviving trustee, are necessarily very circumscribed. The heir of a last surviving trustee may indeed make up titles to the trust-estate and convey it to a factor, or to the beneficiaries; but it is doubtful whether a trustee by succession can execute the discretionary powers of the trust; and it is clear that the beneficiaries are entitled to have the heir superseded in the trust by the appointment of a judicial factor. Professor Menzies distinguishes between the case where heirs are called by the destination and where they are omitted, as it is only in the event of the heir being called that he is said to be entitled to execute the trust.^(e) In practice, the distinction between the two cases is understood to be very slender. If the heir is called by the destination, he may, as already explained, make up a title by service as heir of provision, for the purpose of conveying the estate to others; while an heir not called is understood to have no title to interfere, and is merely called *pro forma* as defender in the process of declaratory adjudication.

1829. The view here taken of the position of a trustee by succession, is supported by the opinion of Lord Justice-Clerk Hope in *Gordon's Trs. v. Eglinton*.^(f) The trustees in that case had made up a title by disposition from the truster's eldest son, whereby the estate was conveyed to the "trustees under the trust-disposition before specified, and their heirs and assignees whomsoever." The Lord Justice-Clerk observed, "It is true that under this disposition, by which it was intended entirely to divest the eldest son and his heirs, the title to the lands would be carried on after the death of the trustees into the persons of their heirs, so as to prevent the right reverting to the eldest son, or to support the acts of any person who might be appointed to act, if all the three had died. But the heirs would not have been trustees in any other sense than that their title would have been burdened with the obligation to hold

Heir succeeds to the estate, but not to the office of the trustee.

^(d) Parker on Adjudications, 86; *Dalziel v. Dalziel*, 1756, M. 16,204; *Drummond v. Mackenzie*, 1758, M. 16,206; *D. of Hamilton's Cr. v. E. of Selkirk*, 1740, Elch., "Trust," No. 9.

^(e) Menzies on Conveyancing, 8d ed., p. 705.

^(f) *Gordon's Trs. v. Eglinton*, 17 July 1851, 18 D. 1881.

CHAPTER LVII. for the purposes of the trust, and to denude when duly called upon. The powers of the office of trustee would not have passed by the law of Scotland." (g) With this opinion it may be useful to compare the case of *M'Leish's Trs. v. M'Leish*, (h) in which a destination to *assignees* was held to confer a power of continuing the trust by assuming new trustees.

Effect of destination to trustees, "their heirs and assignees."

1830. In *Gordon's* case the judges of the Second Division were all of opinion that a destination to trustees and *their* heirs meant that the heir of the last survivor should succeed alone, the title of predeceasing trustees being held to have lapsed altogether, in accordance with the doctrine of survivorship. But where the intention of the truster is to create a permanent trust, it would appear that a general destination to "trustees, their heirs and assignees," carries the estate, not to the heirs of the last survivor, but to the heirs-at-law of all the trustees. In the case of *Ferguson v. Marjoribanks*, (i) the truster conveyed his estate to trustees, their heirs and assigns, for the purpose, *inter alia*, of founding and maintaining a grammar school. All the trustees having died, it was maintained that the succession had vested by the law of England in the defender, as heir of the last surviving trustee; and the Court was invited to make a new nomination, on the ground that this gentleman was disqualified by bankruptcy. Lord Rutherford, before whom the case came in the first instance, seems to have assumed that the law of Scotland would carry the trust, under the given destination, to the heirs of *all* the trustees; and his only difficulty was in deciding whether the decision must be governed by the law of England or that of Scotland.

Lord Colonsay's opinion.

1831. Lord President Colonsay, while adhering to the Lord Ordinary's decision, as being in accordance with the expressed intention of the testator, that there should be more than one continuing trustee, would not say that the law of Scotland differed from that of England as to the construction of a general destination to trustees and their heirs. Distinguishing between those duties of the trustees which are properly *executory*, and those which relate to the permanent management of the school, he remarked, "Assuming, as to the first part of the trust, that the party who is to receive and invest this fund in the event of the failure of the persons named, would be the heir *of the last survivor* of them, that does not necessarily solve the question, who are the parties to have the government of the school afterwards?" (k) Looking to the peculiar cir-

(g) 18 D. 1885.

(i) *Ferguson v. Marjoribanks*, 1 April

(h) *M'Leish's Trs. v. M'Leish*, 25 May 1858, 15 D. 637.
1841, 8 D. 914.

(k) 15 D. 642.

cumstances of this trust, we do not think that the decision can be regarded as overruling that of *Gordon v. Eglinton* in the case of ordinary family trusts. It certainly would lead to most anomalous consequences, if the mere use of the general expression "their heirs" were to be held to entitle the heir of each deceasing trustee to take his place in the trust along with the surviving original trustees, or even to join in the ultimate conveyance to the beneficiaries.

PART VIII.

OF POWERS.

CHAPTER LVIII.

POWERS INCIDENT TO THE OFFICES OF TRUSTEE AND EXECUTOR.

Distinction between the usual or implied powers of trustees, and special powers.

1832. The powers of trustees and executors are either such as are inherent in the office, termed usual or ordinary powers, or such as are conferred on them by express grant, termed special powers. The latter are in some cases held to be given by implication, *e.g.*, in the case of an authority to execute a special purpose, where the powers incident to the fulfilment of the trust-purpose are held to be implied in the direction or authority for its execution.

Identity of powers in relation to trustees, judicial officers, and executors.

1833. I. COMMON LAW AND STATUTORY POWERS.—Under this head we purpose to give an account of the powers that are inherent in the office of a trustee or executor, or that have been annexed to these offices by statute, observing that the powers of judicial officers are substantially the same as those of trustees appointed by testamentary disposition. It is not always possible to determine with certainty whether a particular power is given by implication; and to avoid such questions it is usual and proper to insert in trust-settlements a grant of such powers as are conceived to be necessary in order to the due fulfilment of the purposes contemplated by the truster.

Powers in relation to the payment of debts.

1834. The fulfilment of the truster's antecedent obligations is, of course, the primary purpose of a testamentary trust. Irrespective of any special direction, it is apparent that every trustee has the power of defraying out of the proceeds of the trust-estate all debts and charges which can be shown to affect it, agreeably to the

maxim, that a trustee may voluntarily do everything that he might be compelled to do by action. (a) Where the estate appears to be sufficient, he may lawfully pay *primo venienti*; and if he does so, acting in good faith, he will be protected although the estate should ultimately prove insufficient. (b) This rule will not of course apply to trusts created expressly for behoof of creditors. Trustees, like executors, are not bound to pay except on decree; and where there is reasonable doubt as to the existence of the debt, or the sufficiency of the funds, it will be their duty to decline to pay except under judicial authority, leaving the debtor to constitute his claim, or to bring an action of distribution. Among the debts which a trustee is bound to discharge, may be included the obligation to aliment the truster's family which devolves upon the trustees as his legal representatives. (c) The Court has even granted authority to trustees to make payments out of capital for this purpose. (d)

1835. For the management of a trust-estate of any considerable extent it will be necessary to retain a certain sum in bank, and to operate upon the account for the purpose of obtaining temporary credit, etc. The granting of bills will in many cases be a necessary act of administration; and in the course of winding-up a business, or completing arrangements for the improvement of property, it may be requisite to enter into contracts with third parties. The miscellaneous class of duties which we have here indicated, and which vary with the nature of the trust purposes, may be executed competently and with propriety by trustees armed merely with the ordinary powers implied in the trust-conveyance. Trustees are of course entitled to grant discharges to the debtors of the estate, which will have the effect of binding their constituents, and on receiving payment, to grant such abatements or deductions as may be reasonable. A specific direction—as, for example, a direction to sell lands, and to accumulate the profits for particular purposes—will imply a power commensurate with the direction. (e) And in carrying out the truster's directions, trustees are entitled to take into consideration letters or memoranda written by the truster on the subject of the trust. (f)

Powers incident to the management of personal estate.

1836. Trustees of heritable property are empowered, by neces-

Power of making up titles to heritable estate.

(a) Lewin on Trusts, 5th ed. p. 415.

(b) 1 Bell's Com. 5th ed. p. 88; *Ranken v. Gardner*, 1741, M. 16,201; *Alison v. E. of Dundonald's Trs.*, 1798, M. 16,211; *Pagan v. Eaton*, 17 June 1828, 2 Sh. 125, N. E. 117.

(c) *Riddell v. Riddell*, 6 March 1802, M. "Aliment," App. No. 4; *M'Ewen v. M'Ewen*,

10 Feb. 1842, 4 D. 662; *Pet. Taylor*, 5 Feb. 1850, 11 March 1851, 13 D. 949.

(d) *Pet. Taylor*, *supra*.

(e) *Campbell v. Campbell*, 19 Nov. 1852, 15 D. 27; and see *Pet. Kinloch*, 17 Dec. 1859, 22 D. 174.

(f) *Milne's Trs. v. Cowie*, 25 Jan. 1858, 15 D. 321.

amounting to upwards of £1100, although the amount was somewhat in excess of the sum contemplated by the truster. A trustee is not entitled at his own hand to undertake any extensive system of improvement of landed estate, but it will be his duty to lay out such sums as are necessary for ordinary maintenance and repair.^(o) The Court has been in the practice of granting authority to trustees for minors to renounce leases when circumstances rendered this course necessary or clearly expedient. An example presents itself in the case of *Turner's Trs.*,^(p) where trustees and tutors nominated by a trust-settlement were authorised to renounce a lease, on the ground that the minor was not possessed of sufficient capital to carry on the farm.

Renunciation of leases.

1838. Trustees under family settlements are usually empowered to appoint factors and agents; and even where there is no express power, yet, as their office is gratuitous, they are entitled at common law to avail themselves of the paid services of professional persons for the discharge of such duties as are not of a discretionary character.^(q) There can be no doubt that trustees are entitled, at the expense of the trust, to obtain legal advice and assistance in all matters of difficulty and importance. The delegation of ordinary duties of administration, such as the collection of rents, the temporary custody of money, etc., would not, in the general case, render the trustees personally liable for the defalcation of the factor or agent to whom those duties were intrusted, if the appointment were unobjectionable, and there were no marked neglect in calling the party to account.^(r) Trustees are not entitled without a special power to supersede a factor appointed by the truster.^(s)

Power to appoint factors and law agents.

1839. Trustees have not only the power of changing the securities and investments of the money committed to their care, but it is their duty to do so whenever the existing securities are such as the Court would not approve. This rule applies emphatically to the case where the trust-estate consists of money invested in trade.

Powers in relation to the investment of trust-funds.

(o) See *Cruickshank v. Ewing*, 22 Dec. 1864, 3 Macph. 302. In England it is held that a trustee, like a mortgagee, may take credit for sums expended in reasonable improvements and repairs; *Trimleston v. Hammill*, 1 Ball & B. 385; *Landon v. Hooper*, 6 Beav. 248; but he cannot subject the trust to the expense of making ornamental improvements; *Bridge v. Brown*, 2 Y. & C. Ch. Ca. 181; nor of making such extensive alterations as absorb a large proportion of the value, which has been termed "improving the owner out of his estate."

(p) *Turner's Trs.*, Petrs., 1 March 1862, 24 D. 946, and cases cited *infra*, §§ 1848-9.

(q) Bell's Com. 6th ed. 848; *Sym v. Charles*, 18 May 1880, 8 Sh. 741; *Hay v. Binny*, 19 Feb. 1861, 23 D. 594.

(r) *Cameron v. Anderson*, 12 Nov. 1844, 7 D. 92; *Thomson v. Campbell*, 16 Feb. 1838, 16 Sh. 560; *Ainslie v. Cheape*, 6 Feb. 1835, 13 Sh. 417. See chapter 74, section 4 (Liability for Factors).

(s) *Fulton v. Macalister*, 15 Feb. 1831, 9 Sh. 442.

CHAPTER LVIII. In the two recent cases of *Laird* and *Cochrane v. Black*,^(t) trustees were made personally liable for the profits accruing on the investment of trust money in their own business. Trustees are also individually responsible for any loss resulting from such investments, whether personally interested in the business or not.^(u) Trustees expressly authorised to invest money on personal security are not entitled to lend money to individual beneficiaries, beyond the amount of their shares, on bills or promissory notes. Personal security means the security of personal property; not of a personal obligation. Unless authorised by special powers, trustees can only invest in heritable securities or the Funds.^(x)

Powers of trustees to pursue and defend actions.

Actions brought in the name of the constituent.

1840. The right of action, being a privilege pertaining to every subject, in relation to all matters not expressly withdrawn from the jurisdiction of the Courts, may be exercised by trustees and factors as such;^(y) and they are of course entitled to retain the expenses of reasonable litigation out of the estate. It is unnecessary to multiply references in support of a doctrine so well established. But we may remark, that even where the validity of the deed of appointment is itself the subject of action, as in the case of a reduction of a settlement *ex capite lecti*, trustees, though unsuccessful, have been held entitled to the expenses of their defence, unless they conduct it in a litigious spirit, and so as to create unreasonable expense.^(z) In the prosecutions of actions, trustees have full power to act upon their own opinion and responsibility, and cannot be compelled by the beneficiary either to carry on proceedings at their own risk, or to lend their names to an action raised or maintained at the instance of the latter.^(a) And, conversely, a trustee may not only carry on actions to which his constituent was originally a party,^(b) but may institute actions in the name of the constituent without his consent, and maintain them notwithstanding his disclaimer.^(c) The trustee's general power of pursuing actions has been sustained as a sufficient title to present an appli-

^(t) *Laird v. Laird*, 26 June 1855, 17 D. 984; *Cochrane v. Black*, 1 Feb. 1855, 17 D. 321.

^(u) *Graham v. Keble*, 10 Nov. 1818, 2 Dow, 17; 21 July 1820, 6 Pat. 616.

^(x) Chapter 63, section 4 (Investments).

^(y) Bell's Pr. § 1998. See *Bayne v. Earl of Sutherland*, 18 Feb. 1750, 1 Cr. St. & Pat. 454, and *Disbrow v. Mackintosh*, 27 Nov. 1852, 15 D. 128, as to the evidence necessary to instruct a title to sue on the part of a foreign executor or guardian.

^(z) *Morrison v. Morrison's Trs.*, 28 Dec. 1848, 11 D. 297; see also *Graham and*

Others v. Marshall and Others, 22 Nov. 1860, 23 D. 41.

^(a) *Duke of Buckingham v. Breadalbane's Trs.*, 17 Jan. 1844, 6 D. 408.

^(b) *Mein v. McCall*, 7 June 1844, 6 D. 1112.

^(c) *Carrick v. Hutcheson*, 12 June 1844, 6 D. 1148; *Pitcairn v. Fraser*, 21 June 1834, 12 Sh. 769. As to the right of the remaining trustees to carry on an action after the others have withdrawn, see *Morrison v. Maclean's Trs.*, 27 Feb. 1862, 24 D. 625.

cation for the constitution of entail improvements ;(d) but not to institute an action of division of commonty.(e) CHAPTER LVIII.

1841. It is settled that a judicial factor has the power of compromising doubtful claims and actions ; and, unless perhaps in cases of great importance, the Court would neither give special authority to enter into a compromise, nor interfere with the discretion of the factor after it had been exercised.(f) Professor Bell expresses the opinion that trustees have the same power at common law.(g) There being no reason for a distinction between the powers of factors and those of trustees in relation to this matter, the authority of Professor Bell, in conjunction with the cases just cited, may be regarded as conclusive. The general power of compounding includes of course the particular case of accepting a dividend or composition in bankruptcy.(h) Compromise of doubtful claims, whether within the power of a trustee.

1842. At common law, trustees are not entitled without special powers to refer a question of importance to arbitration, though it would seem the rule would not apply to claims for tradesmen's accounts and the like, where the question is as to the amount and not as to the liability of the trust-estate.(i) The authorities respecting compromises are not analogous. It may be a prudent and judicious act of management to settle a doubtful claim ; but the propriety of superseding the action of the regular tribunals by arbitration is not so apparent.(k) It is clear, notwithstanding, that trustees are at liberty to carry on proceedings in arbitrations which have been entered into by their constituents,(l) for it cannot be their duty to submit to an adverse decision to the prejudice of the beneficiary. By section 176 of the Bankruptcy Act 1856, the trustee on a sequestrated estate is empowered to compound and transact or refer to arbitration questions regarding the estate ; and the creditors and the bankrupt are bound by the result of such transaction or reference.(m) Arbitrations and references, power to enter into.

1843. In exercising any personal privilege attached to the trust-estate, the trustee must act under the instructions of his con- Franchise.

(d) *Fraser v. Lovat*, 24 June 1852, 14 D. 916.

(e) *Graham's Trs. v. Boswell*, 2 Dec. 1830, 9 Sh. 121.

(f) See *Anderson*, 29 Jan. 1857, 19 D. 329 ; *Anderson*, 7 March 1855, 17 D. 596 ; *Macdougall*, 24 June 1853, 15 D. 776 ; *Aikman*, 17 July 1863, 1 Macph. 1140.

(g) Bell, Pr. § 1998 ; *Mackintosh v. Williamson*, 4 July 1849, 11 D. 1246 ; *Kennedy v. Kennedy*, 15 Nov. 1843, 6 D. 40.

(h) Bell's Pr. *supra* ; *Watson v. Morrison*, 27 June 1848, 10 D. 1414.

(i) Ersk. 3, 3, 39 ; Bell on Arbitration, 98, 107 ; *Thomson's Trs. v. Thomson's Exrs.*, 18 Dec. 1867.

(k) See *More's Exrs. v. Malcolm*, 24 Jan. 1835, 13 Sh. 313 ; and the opinion of Lord Curriehill in *Anderson's* case, *supra*.

(l) *Barbour v. Wight*, 21 Nov. 1811, F.C. ; *Grant v. Girdwood*, 28 June 1820, F.C. ; Bell on Arbitration, 98 *et seq.*

(m) As to the powers of a trustee for creditors under a private trust, see *Mackintosh v. Mackintosh*, 10 Nov. 1863, 2 Macph. 48.

CHAPTER LVIII. stituent.(n) How far this principle applies to voting has not been expressly determined. Trustees and executors, although unconfirmed, may vote as creditors in the election of a trustee on a sequestrated estate, or at a meeting for considering an offer of composition.(o) And it would seem they may vote as shareholders in railway companies upon their own responsibility, though this has been questioned.(p) Trustees are disqualified by the Reform Act from voting in the election of members of Parliament.

Powers of trustees in relation to promoting bills in Parliament.

1844. In the case of *Campbell*, Petr.,(q) trustees of an entailed estate were found entitled to the expenses incurred by them in opposing a bill before Parliament, which they believed to be injurious to the estate, on the ground that they were bound to protect the property. But trustees and statutory commissioners are not entitled, at the expense of the estate, to seek an *extension* of their powers from Parliament.(r) Accordingly, in the case of *Mackintosh's Trs. v. Mackintosh*, where the magistrates of a burgh who were trustees of a mortification had incurred expenses in promoting a bill for extending the operation of the charity, which was unsuccessful, and their successors in office, disapproving of the bill, agreed to pay the expenses of opposing it out of the trust-funds, the Court granted interdict, on the application of the truster's representative, against the intended application of the funds for that purpose.(s) So also statutory trustees and railway directors(t) have been interdicted from applying the funds of the shareholders towards payment of the expense of applying to Parliament for extension of their powers.(u)

(n) See cases noted *antea*, chap. 54, sect. 1 (Office of Trustee).

(o) *Chalmers' Trs. v. Watson*, 12 May 1860, 22 D. 1060.

(p) *Blackburn v. Findlay*, 4 Feb. 1848, 10 D. 590.

(q) *Pet. Campbell*, 12 Jan. 1847, 9 D. 897.

(r) *Pet. Myles*, 18 Dec. 1855, 18 D. 205.

(s) *Mackintosh's Trs. v. Mackintosh*, 30 June 1852, 14 D. 928.

(t) *Brown v. Adam*, 19 Feb. 1848, 10 D. 744.

(u) The same distinction has been taken by the English Courts. Thus, in *Bright v. North*, 2 Phil. 220, 16 L. J. Ch. 255, trustees for the conservation of a river were found entitled to the expense of opposing a bill for a project likely to prove injurious to the banks under their superintendence. Lord Cottenham said that the trustees were entitled to the proper and necessary expense of protecting the property com-

mitted to their care; and although there was no direct authority in their Act of Parliament for the application of the funds to the proposed purpose, he thought it was incident to the powers given to the commissioners and the duties imposed on them; 16 L. J. Ch. 258. The same principle was affirmed by the Queen's Bench in *Reg. v. Norfolk Comrs. of Sewers*; the criterion being that the proceedings are necessary and reasonable; 15 Q. B. R. 540, 20 L. J. Q. B. 121. On the other hand, the Court of Chancery will grant an injunction to prevent the funds of parliamentary trustees from being applied to the promotion of a bill for additional powers. Of this we have an example in *Attorney-Gen. v. Andrews*, 2 M'N. & G. 225, 19 L. J. Ch. 197, where the late Vice-Chancellor of England was clearly of opinion that the trustees could not claim the benefit of the principle laid down in *Bright v. North*. See on this

1845. By Section 2 of the "Trusts (Scotland) Act 1867" (x) it is enacted, with reference to all trusts constituted by virtue of any deed or by private or local Act of Parliament, that "In all such trusts the trustees shall have power to do the following acts, where such acts are not at variance with the terms or purposes of the trust, and such acts when done shall be as effectual as if such powers had been contained in the trust-deed, viz. :—

CHAPTER LVIII.

Powers given to trustees by the Trusts Act 1867.

- " 1. To appoint factors and law agents, and to pay them a suitable remuneration :
- " 2. To discharge trustees who have resigned, and the representatives of trustees who have died :
- " 3. To grant leases of the heritable estate of a duration not exceeding twenty-one years for agricultural lands, and thirty-one years for minerals, and to remove tenants :
- " 4. To uplift, discharge, or assign debts due to the trust-estate :
- " 5. To compromise, or to submit and refer all claims connected with the trust-estate :
- " 6. To grant all deeds necessary for carrying into effect the powers vested in the trustees :
- " 7. To pay debts due by the truster or by the trust-estate without requiring the creditors to constitute such debts, where the trustees are satisfied that the debts are proper debts of the trusts."

1846. By Sections 5 and 6 of the same Act, the powers of trustees in relation to the investment of trust money are also extended. (y)

Provision saving existing claims.

In the construction of these sections it is necessary to keep in view the 19th section, which provides that "nothing in this Act contained shall be construed as innovating, revoking, or restricting any express powers or directions given to trustees acting under any trust-deed, or shall affect the decision of any question which may at the passing of this Act be the subject of a depending action; and none of the powers and incidents by this Act conferred or annexed to the office of trustee shall take effect or be exercised if it is declared in the trust-deeds that they shall not take effect; and when there is no such declaration, then if any variations or limitations of any of the powers or incidents by the Act conferred or an-

point, *Vance v. East Lancashire Ry. Co.*, 3 K. & J. 50; *Att.-Gen. v. Guardians of Southampton*, 17 Sim. 6, 18 L. J. Ch. 393; *Att.-Gen. v. Corp. of Norwich*, 16 Sim. 225; *Stevens v. S. Devon Co.*, 13 Beav. 48, 20 L. J. Ch. 491. The Courts, however, will not

secuting a bill before Parliament at their own risk; *Stevens v. S. Devon Ry. Co.*, *supra*; *Anstruther v. East of Fife Ry. Co.*, 19 April 1852, 1 Macq. 98.

(x) 30 & 31 Vict., cap. 97.

(y) See chapter 68 (Administration of Trusts of Personal and General Estate).

for authority to borrow money on the security of the trust-estate. (d) CHAPTER LVIII.
 The opinion of the judges was requested in answer to the question
 —“On the assumption that the trust-deed does not by construction
 or implication empower the trustees to borrow money on the secu-
 rity of the trust-estate, . . . Whether it is competent for the
 Court, by the exercise of its *nobile officium*, to confer on the trus-
 tees power to borrow money on the security of the trust-estate?”
 The judges were unanimous in answering this question in the
 negative, while at the same time they reserved to the petitioner
 the right of bringing an action of declarator for determining whether
 the settlement contained a grant of such a power by construction
 or implication. (e) The Court will not determine any question in-
 volving the right to the beneficial interest under an application by
 a trustee or factor for authority to distribute. (f)

By the Trusts (Scotland) Act 1867, jurisdiction is conferred Statutory exten-
sion of jurisdic-
tion.
 on the Court of Session, enabling the Court to grant certain extra-
 ordinary powers to trustees. (g)

(d) *Kinloch and Ors.*, Petrs., 7 Dec. 1859,
22 D. 174.

(e) It would seem that such power may
 still be granted by the Court in the exer-
 cise of their common law jurisdiction to trus-
 tees who are also tutors-nominate; *Camp-*

bell, Petrs., 17 July 1867, 5 Macph. 1058,
and cases there cited.

(f) *Drew*, Petrs., 14 June 1867, 5 Macph.
892; and see *Hepburn's Tutor*, 19 July
1866, 4 Macph. 1089.

(g) See chapter 59, *infra*, §§ 1880-1.

CHAPTER IX.

OF GRANTS OF SPECIAL POWERS TO TRUSTEES.

1850. Following the

1850. Following the conclusion of the chapter for a statement of the nature of powers to trustees, we proceed to the consideration of the subject of grants of special powers by trustees or testators. As to powers of sale, we have already seen that the power of realising the personal estate is a necessary, and therefore an implied, function of the office of trustee. Were it not so, trustees would be unable to perform the most ordinary duties of the trust, such as payment of debts, or withdrawing the trust money from insecure investments. Nor could they effectually carry out the purposes of distribution contemplated by the testator.

1851. A different rule has long prevailed regarding the right of trustees to dispose of heritable property. Influenced, perhaps, by the fear that ancestral property might be needlessly sold, and partly by a notion, now exploded, that such sales might alter the character of the testator's succession, the courts of law, both in England and Scotland, have from the first viewed with great jealousy every assumption by trustees of real estate of powers not specially conferred upon them.

1851. A different rule has long prevailed regarding the right of trustees to dispose of heritable property. Influenced, perhaps, by the fear that ancestral property might be needlessly sold, and partly by a notion, now exploded, that such sales might alter the character of the testator's succession, the courts of law, both in England and Scotland, have from the first viewed with great jealousy every assumption by trustees of real estate of powers not specially conferred upon them. (a) In the case of trusts, the strict application of the principle that heritage could not be sold without special authority, would have led to absurd consequences, calling for remedial legislation; and the modified doctrine was accordingly received, that a power of sale might be inferred by implication from the nature of the trust purposes, although not granted *per expressum*. Accordingly, in the cases of *Erskine* (b) and *Henderson v. Somerville*, (c) it was decided that trustees authorised to sell certain portions of the truster's estate, might proceed to sell the remaining estate when the produce of the subjects to which the power was

(a) *Ersk.* 8, 3, 39.

(c) *Henderson v. Somerville*, 22 June

(b) *Erskine v. Wemyss*, 18 May 1829, 7 1841, 8 D. 1049.

8h. 594.

applicable proved insufficient for the payment of the trust-debts. It is true the authority of these cases was somewhat shaken by the judgment of Lord Brougham in *Allan v. Glasgow's Trustees*; (d) yet, while affecting to doubt the existence of implied powers of sale in the deeds which were the subject of construction in those cases, Lord Brougham did not hesitate to adopt the principle of those decisions, that a power of sale may be inferred from the purposes of the deed. Accordingly, it was subsequently found that a trust of heritage for payment of debts implied a power of selling so much of the estate as might be necessary for that purpose. (e) Trustees for charitable purposes have been held entitled to dispose of superiorities for the benefit of the trust-estate. (f) But companies vested with authority to carry through compulsory purchases of property cannot enforce the sale of superiorities. (g) Where the power to sell depends on implication, we would recommend trustees not to sell without first having their powers fixed by a decree of declarator pronounced *causa cognita*. It may be inferred from the decision in *Kinloch's* case (h) that the Court would not entertain

(d) *Allan v. Glasgow's Trs.*, 1 Sept. 1835, 2 S. & M.L. 333, 350; *Campbell's Trs. v. Campbell*, 4 Dec. 1838, 1 D. 153.

(e) *Graham v. Graham's Trs.*, 21 Dec. 1850, 13 D. 420; and see *Meiklam's Trs. v. Mrs Meiklam's Trs.*, 2 Dec. 1852, 15 D. 159; *Adv.-Gen. v. Smith*, 1 Mar. 1852, 14 D. 585 and 1 Macq. 760. It has never been doubted in England that a testator charging his real estates with payment of his debts, gave thereby an implied authority to the *devisee* of the estate to sell for payment. But on the question whether an executor, in whom the legal estate was *not* vested, had the power of selling, considerable diversity of opinion exists. Baron Parke, in the Court of Exchequer, laid down that in such a case the executor could only enforce the power by proceeding against the devisee, if the estate were devised, or against the heir-at-law if the property devolved upon him by inheritance (*Doe d. Jones v. Hughes*, 6 Exch. 228, 20 L. J. Ex. 148); though he allowed, upon the authority of *Forbes v. Peacock* (12 Sim. 528, 13 L. J. Ch. 46), and the other Chancery cases, that the executor might sell if clothed by implication with a power. The Lords Justices have since affirmed the power of the executor to sell in all cases where the real estate is charged

with payment of debts; *Robinson v. Lowater*, 17 Beav. 592, 23 L. J. Ch. 641; *Wrigley v. Sykes*, 21 Beav. 337, 25 L. J. Ch. 458. But these decisions are disapproved by Lord St Leonards, who says (*Vend. & P.* 13th ed. p. 545), that it would not be safe to rely on their authority.

In any use that may be made of those decisions by the Scotch lawyer, it must be kept in view, (1) that the heir-at-law cannot be burdened with payment of debts by testament; (2) that a disponent may; (3) that a power to sell heritage, given to an executor in the most express terms, not being annexed to a conveyance of the estate, is only a mandate, and is therefore ineffectual, on the principle that a mandate cannot be exercised after the death of the mandant. In the event, therefore, of the disponent refusing to concur in a sale, the executor, it would seem, must either pay the debts and bring an action of relief, or leave the creditors to enforce their claims against the heir as the party primarily liable.

(f) *Moore's Trs. v. Wilson*, 25 June 1814, F.C.

(g) *Todd v. Clyde Trs.*, 29 Nov. 1843, 6 D. 108.

(h) *Infra*, § 1857.

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the question under a petition; but the expense of an unopposed declarator would not be materially greater.(i)

Powers of sale
of tutors and
judicial officers.

1852. In the case of tutors and judicial officers holding only general powers, the rule which prohibits the disposal of heritage has been very rigidly enforced. To justify a sale there must be, as observed by Lord Deas, a "legal necessity." (k) This, we presume, is equivalent to saying, that when the existence of the trust is endangered—e.g., by dilapidation of the property, the use of diligence, etc.—a power of sale will be granted. The cases have been collected by Mr Thoms.(l) It would serve no good purpose to recapitulate them; as they import, in substance, nothing more than a natural reluctance on the part of the Court to sanction the disposal of trust property, shown by the substitution of an ideal "necessity" in place of that sound discretion which, in ordinary matters, must determine the course of trust-administration.

Power some-
times equivalent
to a direction.

1853. As a purpose of distribution amongst legatees may imply a power of realising the estate, so, conversely, a power of sale may be so expressed as to manifest an absolute intention in the mind of the testator that the property should be sold; and may thus be equivalent to a direction. The criterion of intention to sell, in questions as to the conversion of the succession, is whether the exercise of the power was *indispensable* to the carrying out of the trust. This test was proposed by Lord Fullerton, and sanctioned by the House of Lords, in *Buchanan v. Young*.(m) If trustees exercise a power of sale upon reasons of expediency, although there is no breach of duty on their part, the succession remains unconverted.(n)

Exercise of a
power of sale.

1854. The execution of powers of sale being the subject of discussion in another chapter,(o) we merely note here that trustees acting within their powers are not subject to any personal liability on the alleged ground that the sale was unnecessary, or that the estate was sold for an inadequate price. The leading cases are *Clelland v. Brodie*,(p) where the question was tried at the instance of a beneficiary; and *Fleming v. Campbell*,(q) an action at the instance of a partner against directors of a trading company. On

(i) An example of an action of declarator of powers will be found in the case of *Cameron's Trs. v. Cameron*, 8 Dec. 1869, 3 Macph. 200.

(k) Pet. *Maconochie*, 3 Feb. 1857, 19 D. 366; *Lawson, Petr.*, 20 Feb. 1868, 1 Macph. 424.

(l) Thoms on Judicial Factors, p. 242 *et seq.* An express power may be exercised

by a judicial factor. See *Muller's case*, *infra*.

(m) *Buchanan v. Angus*, 15 May 1862, 4 Macq. 374, reversing 22 D. 979.

(n) See chapter 11 (Constructive Conversion).

(o) Chapter 64.

(p) *Clelland v. Brodie*, 20 Nov. 1844, 7 D. 147.

(q) *Fleming v. Campbell*, 25 June 1845,

the question of power, it is important to observe, that the revocation of a trust purpose carries with it a revocation of a power given with a view to the execution of that purpose.(r)

1855. Purchasers of trust-property ought to satisfy themselves that the trustees have power to sell, otherwise they run the risk of losing their money. Ignorance of the purposes of the trust will not avail as a defence to an action of reduction. The case of the *Magistrates of Airdrie v. Smith*(s) illustrates the danger of purchasing incautiously from trustees. The committee of management of a public school attached to the chapel of ease in Airdrie had sold the school-house to a private purchaser, with the intention of applying the proceeds in payment of the debts of the chapel. This pious fraud was resisted by the magistrates of the burgh, who succeeded in having the sale set aside; the purchaser being left, as Lord Mackenzie observed, to get back the price if he could,—if otherwise, to bear “the penalty of entering into a bargain which he knew he was not entitled to make.”(t) But a purchaser will not be permitted to take advantage of immaterial deviations from the terms of the trust-provisions for the purpose of getting quit of his bargain.(u) As a contrast to such cases, we may mention the case of *Duff*, in which the ground of reduction was, that the seller, a curator, had sold the property after the death of his ward, and when he was necessarily *functus officio*.(x)

Purchasers ought to satisfy themselves as to the power of the trustee to sell.

1856. It may easily be shown by an examination of the authorities, that there is no limitation of the powers of trustees at common law in the matter of borrowing money for the purpose of carrying into effect the provisions of the trust. If the money is required, and can be obtained on the personal credit of the trustees, the sum received will of course be placed to the credit of the trust; and, on repayment with interest, it will form a proper charge against the fund available for distribution amongst the beneficiaries.(y) In transactions of this kind, it may be said, in a sense, that the security of the trust-estate is pledged; because all debts properly and *bona fide* incurred for the benefit of the estate form a preferable

Powers of trustees in relation to borrowing on the security of the trust-estate.

7 D. 935. The question, whether trustees have the power of selling, may be tried in the form of a suspension of a threatened charge for the price. See *Hay v. Morrison*, 7 July 1838, 16 Sh. 1273; *Macgregor v. Gordon*, 1 Dec. 1864, 3 Macph. 148.

(r) *Grindlay v. King*, 8 Nov. 1853, 16 D. 27.

(s) *Mags. of Airdrie v. Smith*, 18 July 1850, 12 D. 1222; see *Mitchell v. Major*, 12 Nov. 1856, 19 D. 80.

(t) 12 D. 1229.

(u) *Sinclair v. Trail*, 17 July 1847, 9 D. 1515. See *Muller v. Dixon*, 11 Feb. 1854, 16 D. 586, where a judicial factor upon a marriage-contract trust was held entitled to exercise a power of sale.

(x) *Duff v. Gorrie*, 23 May 1849, 11 D. 1054.

(y) Bell's Pr. § 1998.

CHAPTER LIX. charge upon its revenues. Indeed, we feel warranted in saying, though we cannot refer to any recent authority on the subject, that a trustee obtaining advances on his own credit for a necessary purpose—as, for example, to complete buildings begun by his constituent, or to pay off creditors who are threatening to attach the property—is entitled to retain the estate as against the beneficiaries until relieved of his obligations.^(z) But he could not *burden* the property without special authority. The distinction is a substantial one. The beneficiary is entitled not only to the value of the succession left to him, but to the *corpus* of the estate, if he chooses to take it with its liabilities. Now, borrowing upon security, more especially if a power of sale is added, is a sort of alienation. It gives the creditor facilities for attaching and disposing of the property without notice to the beneficiary, which are altogether incompatible with the right of the latter to obtain specific delivery of the estate.

Power to borrow on security must flow from the trust.

1857. The right to borrow on security must therefore result from authority specially conferred by the truster; and, according to the decision of the whole Court in *Pet. Kinloch*,^(a) such authority may be deduced from the terms of the trust-deed, “by construction or implication.” We have already referred to the more important aspect of this case, as settling the doctrine that the Court cannot supplement the powers of voluntary trustees. The judgment in this case, while overruling some decisions of doubtful authority, does not imply any dubiety as to the competency of conferring special powers upon factors or guardians appointed by and subject to the control of the Court of Session.^(b)

A power of borrowing on security may be given by implication.

1858. The principles upon which a power to borrow may be deduced by implication, have already been noticed in connection with the subject of powers of sale. Their application to the case of borrowing cannot be attended with any peculiar difficulty; and we are not aware of any case in which such powers have been established by declaratory decision. Where a trust-deed contemplates the retention of landed property in the hands of trustees for any considerable period—with an ultimate purpose, not of division, but of specific conveyance—and at the same time authorises an expenditure of money, during the continuance of the trust, greater than the revenues of the estate will afford, we should consider that a

^(z) *Dewar v. Ross*, 1767–8, Bell’s Oct. Ca. 541; 2 Bell’s Com. 5th ed. 84.

^(a) *Pet. Kinloch and Ors.*, 7 Dec. 1859, 22 D. 174; *Ker, Petr.*, 8 March 1855, 17 D. 565. See *Dewar v. Ross’s Trs.*, 1792, Bell,

541, where a power to borrow was held to give by implication the right of granting dispositions in security.

^(b) *Per* Lord Colonsay, 22 D. 177; see also *Pet. White*, 7 Mar. 1855, 17 D. 599.

power of borrowing upon security was implied. If trustees are authorised, either expressly or by implication, to borrow on the security of the estate, it follows that they have power to grant a bond and disposition in security, which necessarily contains a power of sale. Without such a power, a loan could not be obtained except at high interest, and with collateral security.(c)

1859. It has been determined, in conformity with the opinion of both Divisions of the Court, that the tutors of an heir of entail cannot exercise the power conferred by the 21st section of the Act 11 and 12 Vict., cap. 36, of granting a bond and disposition in security over the property. This decision will, we presume, apply to the case of testamentary trustees charged with the management, during minority, of property either entailed or to be entailed under the powers of the settlement. We are not aware that any special authority is requisite to enable trustees to borrow money upon the security of moveable property, such as ships, stock-in-trade, etc. The ordinary powers of realising and changing securities, inherent in the office of a private trustee, would, in the absence of an express direction to the contrary, entitle him to raise money by the sale of moveable property. Should circumstances render an immediate sale inexpedient, he would, *a fortiori*, have the power of pledging the property in security of advances.

Power of tutors, curators, and trustees of personal estate.

1860. In the administration of funds appropriated to charitable or other permanent objects, it may sometimes be necessary or expedient to incur liabilities beyond the amount of the income for the year. Advances made to meet a temporary exigency will be sustained to a moderate extent, as a charge upon the trust-estate; but the trustees cannot, without a breach of trust, make such inroads upon the capital as will impair the efficiency of the fund as a source of permanent revenue. "I have no conception," said Lord Medwyn in the case of *M'Leish*,(d) "that if the trustees, on their own responsibility, borrow money, or lay out a large sum on repairs in any year, they will be bound to make the whole a deduction from the receipts of that year, so far diminishing the payments to the objects of the charity; or that they may not pay off such sums by instalments in subsequent years."

Powers of trustees to borrow on heritable security under trusts for charitable or public purposes.

1861. Where trustees of a fund mortified for the benefit of the poor of the town of Forfar overdrew their bank account to the ex-

(c) See *Stewart v. Kirkcaldy*, 14 Nov. 1849, 12 D. 73. In a recent case the Court refused to grant authority to the *curator bonis* of an heir of entail to borrow money on the security of the estate to pay

off debts and legacies; *Lawson, Petr.*, 20 July 1864, 2 Macph. 1422.

(d) *M'Leish's Trs. v. M'Leish*, 25 May 1841, 8 D. 922.

CHAPTER XII. Debt of nearly £500, their annual revenue amounting at that time to £215. 5s. for the purpose of granting relief at a period of unusual distress, the Court refused to find that the lands of the mortification were assignable for the debt, but sustained the expenditure as a charge upon the trust-funds, and, of consent, allowed the debt with accruing interest, to be paid by instalments out of the revenues. The Court were unanimously of opinion that they could not allow the capital to be encumbered upon: Lord Jeffrey remarked, that if the managers had been dealing with a usurer of the Shylock class, who would insist on immediate payment, they might have been made personally responsible. The observation was not intended, as we read it, to throw any doubt on the right of the managers ultimately to obtain relief out of the revenues of the charity.(e) The case of *Brown v. Thomson*(f) shows that the Court will not give encouragement to personal actions against the managers of foundations.

Consequences of effecting loans in excess of the powers competent to the trustee.

1862. When money is borrowed without authority on the security of heritable property, risk attaches both to the borrower and lender. If the sum has been *necessarily* expended—that is, in accordance with the truster's intention—it will form a charge against the beneficiary in so far as the value of the property has been increased by the expenditure. But the beneficiary may renounce the succession; and if the debt is in excess of the value of the property, the trustee will be liable for the deficiency, as was found in the case of *Lawson v. Walker*.(g) On the other hand, the creditor may lose his recourse against the trust-estate in the event of the money being improvidently expended or misappropriated. This was the principle of the decision in *M'Millan v. Armstrong*.(h) in which the security was held good only to the extent of the sum which could be shown to have been applied in fulfilment of the trust purposes. Lord Moncreiff dissented from the judgment, on the ground that the property disposed in security was not part of the original trust-estate, but was a purchase made by the trustees for the purpose of investment; and he would seem to have been of opinion(i) that, although the investment itself was not to be approved of, yet the powers of the trustees in dealing with it would be as extensive as if the fund had remained personal: *Surrogatum sapit naturam ejus, in cujus loco surrogatur*.

Powers of guardianship given to trustees.

1863. By the Act 1696, cap. 8, fathers are empowered, while *in*

(e) *Arbroath Bank v. Stevenson*, 16 June 1847, 9 D. 1228.

(f) *Brown v. Thomson*, 20 June 1849, 11 D. 1182.

(g) *Lawson v. Walker*, 2 Dec. 1845, 8 D. 232.

(h) *M'Millan v. Armstrong*, 6 Dec. 1848, 11 D. 191.

(i) 11 D. 208.

liege poustie, to name tutors and curators to act for their children after the appointer's death. When, therefore, a father appoints his trustees to be tutors and curators to his minor children, the powers of the trustees in the matter of guardianship will be such as the law confers upon guardians generally, with such additional powers as the deed may specially grant. Tutors-nominate, who do not require to find caution, appear to occupy virtually the same position as trustees with reference to the source from which their authority is derived; and we apprehend that the Court would in future consider itself bound to refuse applications for special powers on the part of tutors-nominate. Curators being only required to act as consenting parties (which is almost necessarily a discretionary duty), are less likely to be embarrassed in consequence of the omission to clothe them with authority for any purpose of administration.

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Appointment of trustees by a father to be tutors and curators to his children.

1864. Any person making a gratuitous conveyance of property to a minor is entitled to appoint curators for him, whose powers, however, are limited to the management on his behalf of the property so conveyed. Such appointments are regarded as conditions annexed to the gift of property, with reference to its disposal and management, and are effectual to exclude the management of ordinary curators as to the property so conveyed; but it has been held that a nomination of this kind does not prevent the minor from choosing curators for himself.^(k) It is doubtful whether the appointment of tutors and curators by a stranger gives a trustee the powers, or imposes upon him the responsibilities of the office of guardianship. The general opinion is, that it is merely equivalent to a direction to protect the interest of the minors to the best of his ability.^(l) As the offices of trustee of an estate and testamentary tutor or curator are distinct, it has been held that the grantee may accept the one trust though he declines the other;^(m) and under the Statute 1696, cap. 8, the offices of tutor and curator-nominate may be disjoined.

Appointment of tutors and curators, whether competent to a trustor who is not in loco parentis.

1865. Testamentary curators, appointed by a stranger, being merely invested with a *quasi* power of guardianship, do not seem to be subject to the statutory responsibilities of legal guardians. A testamentary tutor, so called, when appointed by a stranger, is in reality only a curator. His powers do not extend to the custody of

Trustees exercising powers of tutors, whether responsible under the Statute.

(k) *Wilson v. Campbell and Others*, 10 March 1819, F.C.

(l) *Fraser*, P. & C. 174; 8 Bell's Ill. 28; *More's Notes*, 85, 86. However, it was found, in two cases, that testamentary tutors were bound to make up inventories; *Kirkpat-*

rick v. M'Alpine, 1793, M. 16,381; *Hamilton v. Hawkins*, there cited; and see Hume, Sess. Pap. in Adv. Lib., "Winter 1789-90," No. 118.

(m) *Mollison v. Murray*, 19 Dec. 1833, 12 Sh. 237.

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the minor's person ; and it is difficult to see in what respect his powers differ from those of an ordinary trustee. Whether appointed under the name of tutors or curators, we apprehend that the provisions of the recent Statute, exempting trustees from joint responsibility, must be extended by construction to such guardians. With regard to the duty of making up of inventories, it has been generally held, that as the trust-deed itself shows the extent of the property placed under their management, curators appointed by strangers are not under any obligation to comply with the requisitions of the Scottish Statutes.(n) The remarks we have just made regarding the powers of testamentary curators, will also apply to the case of pro-curators charged with the custody of property bequeathed to insane or imbecile persons.

Appointment of guardian by a trustor to himself.

1866. In connection with this subject, we may refer to a special case, which raised the question whether a party was entitled to appoint a curator to himself in contemplation of his own supervening incapacity. The case came before the Court in a petition from the parties so selected, to be appointed curators ; and the judges, being satisfied that the unfortunate gentleman was in possession of his faculties at the time when he foresaw the calamity that ultimately overtook him, gave effect to his wishes ; but, at the request of his relatives, conjoined a third party along with the curators-nominate.(o)

Powers of making advances out of capital.

1867. Powers of making advances from capital for the maintenance of children, of increasing the allowances of liferenters and annuitants, and the like, generally imply a reference to the discretion of the trustee ; and where the administration of the trust passes into the hands of the Court, it has been doubted whether the judicial factor is entitled to exercise such powers under reference to the advice of the Court. In a recent case it was ruled that an application should, in the first instance, be addressed to the factor, calling on him to exercise the power, before the Court is appealed to.(p) Discretionary powers must not be strained : trustees will not be permitted, to take credit for sums advanced out of the capital for maintenance and education, where those purposes, by the terms of the settlement, are to be provided for out of the income of the estate.(q) Where a trust-deed contains no provision, or one which is manifestly inadequate, for the maintenance of the granter's family

Alimentary advances.

(n) Accordingly, the soundness of the decisions to the contrary has been questioned by Prof. J. G. Bell, Prof. More, and Mr Fraser ; see § 1864, *supra*.

(o) *Todrick v. Sibbald*, 9 March 1833, 11 Sh. 561.

(p) *Mackay v. Ewing*, 10 July 1867, 5 Macph. 1004.

(q) *Heriot's Trs. v. Fyffe*, 8 March 1836, 14 Sh. 670.

during the period of minority, the trustees may provide the necessary means out of the estate; for they are bound, as the testator's representatives, to aliment his family. (r) Authority has sometimes been granted to trustees to make advances out of the capital of the trust-estate for the maintenance and education of the family; but the judges have latterly shown an indisposition to interfere with the management of private trusts. In the case of *Hamilton*, Petr., (s) the Court authorised trustees to advance a small sum for the current year's expenses, and intimated that they would entertain a similar motion in future years, if necessary. But in a more recent case (t) a similar prayer was refused, on the ground that the vesting of the fee was rendered contingent by a clause of survivorship. In such circumstances, payment, by way of anticipation, might have the effect of depriving the eventual legatees of a portion of their succession. (u) Where full powers are given to the trustee, whether to advance capital to a liferenter, (x) or to restrict the right of a legatee to an alimentary liferent, (y) the Court will not be disposed to interfere with his discretion. But a power of restricting a provision to an alimentary liferent cannot be used capriciously, so as to defeat the right of an assignee for value. (z) It seems to have been doubted by the judges who decided *Nisbet v. Tod*, (a) whether a power of making alimentary advances, conferred by a truster, could be exercised by a judicial factor. There seems to be no good reason why it should not; for such powers do not involve the exercise of an arbitrary discretion, but merely of sound judgment applied to the circumstances and wants of the family. (b)

1868. It would be foreign to the object of ordinary family trusts to allow purchases of property to be made either for investment or on speculation. It is not enough that investments of trust-money should be safe; they must be such as are capable of being

Power to purchase lands, its construction and effect.

(r) *Dunbar's Trs. v. Shaw*, 13 Nov. 1805, Hume, 265; Pet. *Taylor*, 5 Feb. 1850, 13 D. 948. But a claim of aliment is not maintainable in defence to a reduction of a provision, as being *ultra vires*; *Logan v. Campbell*, 5 Br. Sup. 338.

(s) Pet. *Hamilton*, 20 July 1859, 21 D. 1379, 23 May 1860, 22 D. 1095. See the powers given to the Court by the recent Statute, *infra*, § 1881.

(t) Pet. *Mundell*, 24 Jan. 1862, 24 D. 327.

(u) See the English cases:—*Swinnock v. Crisp*, Freem. 78, and *Walker v. Weatherell*, 6 Ves. 473. The Court of Chancery refused to grant authority to make ad-

vances out of funds subject to a destination over; *Lee v. Brown*, 4 Ves. 362; *Worthington v. M'Craw*, 23 Beav. 81, 26 L. J. Ch. 286. This is in precise accordance with the rule laid down in *Mundell's* case.

(x) *Hambleton v. Hambleton's Trs.*, 25 Nov. 1863, 2 Macph. 137.

(y) *Ker's Trs. v. Weller*, 2 Macph. 371, 2 March 1866, 4 Macph. H. L. 8; L. R. 1 Sc. Ap. 11.

(z) *Adam and Forsyth v. Forsyth's Tr.*, 16 Nov. 1867, 6 Macph. 31.

(a) *Nisbet v. Tod*, 15 Jan. 1848, 10 D. 361.

(b) Chap. 69 (Anticipation of Payment).

CHAPTER LIX. easily realised. Accordingly, investments of trust-money on landed security ought to be made by way of loan, and not by purchase. In the case of eleemosynary trusts, indeed, the permanency of landed property and its capacity for improvement marks it out as the best possible investment for such purposes; and it is probable that trustees for charitable purposes would be held entitled to invest in the purchase of land without special authority. But trustees of private trusts holding funds for the ultimate purpose of distribution, would not be warranted in entering into such transactions unless specially authorised. In the case of *M'Millan v. Armstrong*,^(c) Lord Moncreiff strongly disapproved of such purchases. "It is very clear to me," he observed, "that under this will there was no power given to employ the personal funds of the deceased, after being converted into money, in the purchase of a land estate. The whole scope and the plain terms of the deed import the reverse. And any such employment of the money in a speculative or ambitious purchase was evidently a thing altogether different from a mere investment at interest for security, even in a real or heritable security."

Grant of power to trustees to convey lands under the conditions of a strict entail.

1869. A trust for the execution of an entail may be in the form either of a direction to entail lands conveyed to the trustees; or it may be in the nature of a trust for the purchase of lands to be entailed on a specified order of heirs. Powers to create entails need not be expressed in technical language, provided a tailzied succession is prescribed, either by specifying the order of heirs, or by reference to the destination of an existing entail.^(d) And the effect of an express direction to entail is not easily destroyed by ambiguous expressions in other parts of the settlement.^(e) Authority to execute an entail may be given by power of attorney.^(f)

Whether a defective entail may be remedied by means of a trust.

1870. Until the Entail Amendment Act came into operation, an heir possessing upon an imperfect entail had no power to amend it, either directly or by means of a trust; the theory being, that the entail was binding *inter hæredes*, and that any attempt to impose new conditions or additional fetters was a departure from the conditions of the grant. In the case of *Baillie v. Cochrane*^(g) this principle, that every entail is complete in itself, was finally esta-

(c) *M'Millan v. Armstrong*, 6 Dec. 1848, 11 D. 207.

(e) *Forsyth v. Ferguson*, 14 June 1832, 10 Sh. 646.

(d) *Leny v. Leny*, 28 June 1860, 22 D. 1272; *Forrest's Trs. v. Forrest*, 14 Dec. 1845, 8 D. 804; *M'Innes v. M'Allister*, 29 June 1827, 5 Sh. 862, N.E. 801; *M'Pherson v. M'Pherson*, 11 June 1852, 1 Macq. 246; *Moncrieff v. Menzies*, 20 D. 95; *Gordon v. Gordon's Trs.*, 2 Mar. 1866, 4 Macph. 501.

(f) *Pet. Napier*, 4 March 1837, 15 Sh. 745.

(g) *Baillie v. Cochrane*, 12 March 1857, 2 Macq. 529, affirming 17 D. 659; *Dempster v. Dempster*, 12 June 1857, 8 Macq. 62, and cases there cited, *supra*, chapter 81 (Entails).

blished; the House of Lords having concurred with the Court of Session in holding that an obligation to execute an entail, even when contained in a contract of marriage, did not create a trust in the person of the heir to execute an entail, because in the marriage-contract itself an attempt had been made to carry out the purposes of the obligation by means of a procuratory of resignation, in which the conditions were imposed by reference. In *Urquhart v. Urquhart*(*h*) a supplementary entail having been declared invalid, on the ground that it imposed new fetters, the Court, in the same action, set aside the original deed, acting under the authority of the 43d section of the Statute, which provides that estates held under a deed of entail defective in one particular may be acquired in fee-simple by the heir in possession. It is the less necessary now to refer particularly to the authorities (a list of which is subjoined) establishing the proposition, that an entail defective in any particular is irremediable by the act of the heirs-substitute ;(*i*) since, by the 43d section of the Entail Amendment Act, imperfect entails are now cut down to simple destinations, which the heir of entail may alter at his pleasure.

1871. Powers of entailing, when constituted by reservation, are strictly construed; and the framing of such provisions is therefore a matter of some delicacy, demanding not only attention to form, but an accurate knowledge of the principles of the law of entail. We may illustrate our meaning by referring to the case of powers reserved by marriage-contract to entail property destined to the heirs of the marriage, or to impose additional fetters on the heirs. In order that such powers may be practically operative, it is not enough that the contracting party reserves the right of making an entail, either in general terms or by reference to the prohibitory and resolutive clauses which he proposes to adject. He must, if he means to alter the destination of the marriage-contract, reserve to himself a power of altering the order of succession; otherwise, the only entail he will be permitted to execute under the reserved power will be one in favour of the eldest son and the heirs of his body, with substitutions conforming as nearly as possible to the order of legal succession.(*k*)

1872. A power to entail lands is defeasible under the Entail Amendment Act, if the direction be defective in any of the pro-

Strict construction of certain powers of entailing.

Powers to entail defeasible under the Entail Act.

(*h*) *Urquhart v. Urquhart*, 13 D. 742, 14 July 1853, 1 Macq. 658.

(*i*) See *Watson v. Pyot*, 1801, M. "Prov. to Heirs," App. No. 4; *Douglas v. Johnston*, 1804, F.C., M. "Fiar, Absol." etc., App. No. 1; *Ormiston v. Ormiston*, 1809,

Hume, 581; *Meldrum v. Maitland*, 29 June 1827, 5 Sh. 857, N.E. 796; *E. of Fyfe v. Duff*, 7 March 1828, 6 Sh. 698.

(*k*) *Macneil v. Macneil's Trs.*, 27 Jan. 1826, 4 Sh. 393, N.E. 396; *Macleod v. Macleod*, 1 July 1828, 6 Sh. 1043.

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in the last case it would probably be the duty of the trustees to execute an entail in terms of the trust, if they were not interpellated. The machinery provided by the Statute for vacating the trust is analogous to the process of disentailing: it being provided that any party (being of full age, and born after the settlement) for whom any landed estate is held in trust, may "make application by way of summary petition to the Court of Session, setting forth the facts, and referring to this Act, and craving the Court to pronounce an act and decree declaring him fee-simple proprietor of such land or estate, and unaffected by any such conditions, provisions, restrictions, or limitations."(*m*)

Power to accumulate rents or money for investment in land.

1873. Sometimes trustees are directed to accumulate rents, or the proceeds of investments, for the purpose of purchasing lands to be afterwards entailed;(*n*) or the trust may be to sell landed property for the purpose of purchasing other lands more contiguous to the principal estate. Under a direction of this nature, trustees have been held entitled to lay out an uninvested balance of the money in erecting a mansion,(*o*) or in the purchase of superiorities,(*p*) but not in the commutation of teind or feu duties.(*q*)

Construction of combined powers to sell and invest proceeds in the purchase of other lands.

1874. Questions of difficulty have arisen in connection with the construction of powers of sale in combination with directions for the payment of debts and entailing the residue. We may observe, that in construing such powers an important distinction has been recognised between trusts for payment of debts, and trusts relating to the destination of residue. In the former case, a power to sell has been held to be implied, on the ground that as the testator's estate was liable to be sold at the instance of his creditors, he must, in voluntarily providing for the payment of his debts, be held to have contemplated the exercise of such a power. This is in substance the principle of the case of *Erskine v. Wemyss*,(*s*) and subsequent cases.(*t*) But an intention that the estate should be sold for the purpose of adding the proceeds to a fund which has been subjected to the fetters of an entail, will no more be implied, in the

(*l*) 11 & 12 Vict., cap. 36, § 43.

(*m*) 11 & 12 Vict., cap. 36, § 47.

(*n*) *Beattie v. Johnstone*, 15 Dec. 1849, 12 D. 357; *Strathmore v. Strathmore's Trs.*, 9 July 1856, 18 D. 1212.

(*o*) *Sprot's Trs. v. Sprot*, 11 March 1830, 8 Sh. 712.

(*p*) *Sharpe, Petr.*, 11 Feb. 1823, 2 Sh. 203, N. E. 180.

(*q*) *Pollexfen v. Stewart*, 14 July 1841, 8 D. 1215; see 30 & 31 Vict., cap. 97, § 8.

(*r*) *Erskine v. Wemyss*, 18 May 1829, 7 Sh. 594.

(*s*) *M'Kinnon Campbell's Trs. v. Campbell*, 4 Dec. 1838, 1 D. 153; and *Henderson v. Somerville*, 22 June 1841, 8 D. 1049.

absence of an express declaration, than an intention to entail the estate itself would be implied. And therefore, where a trust, for the purpose of creating an entail of lands, contains incidentally a conveyance of other lands, as to the disposal of which nothing is said, these, after payment of debts, must be transferred in fee-simple to the heir-at-law.^(u) If, however, the trustees are desired to *convey* the estate under fetters, the direction will be binding unless set aside by an action of declarator.^(x)

1875. It must be kept in view, that trusts which provide for the accumulation of money, whether for the purpose of creating entails or otherwise, are liable to be cut down by the Thellusson Act,^(y) which now, by the 41st section of the Entail Amendment Act,^(z) is extended so as to include accumulations of the rents of heritable property as well as of the interest of money. In the case of *Lord v. Colvin*^(a) an opinion was returned to the Court of Chancery, under the powers of the Law Ascertainment Act, to the effect that implied accumulations are equally void as if they were expressed; an opinion which is in accordance with the most recent English decisions.^(b) The mode of defeating accumulations is provided by the Statute itself; the money is to be "received by such person or persons as would have been entitled thereto if such accumulation had not been directed."^(c) The Act contains an exception with regard to accumulations for the payment of debt, or raising provisions for children.

Questions as to accumulation of rents.

1876. It is easy to see that, in the execution of a duty so delicate and responsible as that of creating an entail, many points of difficulty must occur which can only be settled by having recourse to litigation. From the number of cases that have arisen in the course of the present century, the duties of trustees acting under general powers are now pretty well settled; but the points arising for consideration under special instructions as to the destination and conditions, will doubtless continue to present new features of interest. In another chapter we have treated fully of the execution of deeds of entail by trustees acting under the authority of testamentary powers.^(d)

Duties of trustees in such cases.

1877. By means of a grant of special powers, a truster may remove, in any particular case, the disability which attaches to the relation of trustee and beneficiary in regard to contracts. It is

Power to truster or beneficiary to enter into personal contracts with the trust-estate.

^(u) *Allan v. Glasgow's Trs.*, 1 Sept. 1835, 2 S. & M.L. 333; *Trotter v. Cunningham*, 29 May 1849, 11 D. 1066.

^(z) *Gilmour's Trs. v. Gilmour*, 6 Dec. 1856, 19 D. 134.

^(y) 39 & 40 Geo. III., cap. 98.

^(z) 11 & 12 Vict., cap. 36.

^(a) *Lord v. Colvin*, 7 Dec. 1860, 23 D. 111; see chap. 16, sec. 3 (Accumulation).

^(b) See *Tench v. Cheese*, 6 De G. M. & G. 453.

^(c) 39 & 40 Geo. III., cap. 98, § 2.

^(d) Chapter 65.

of a trustee that individual trustees should have power conferred upon them to become purchasers or tenants of the trust-estate. Trust-settlements frequently empower the trustees to accept the offices of factor and agent to the trust: the utility of such a dispensation with the rules of equity is more questionable in this case than in the case of a grant of authority to purchase. In either case the power will be liberally construed (e).

1878. The powers that may be conferred by grant on fiduciary trustees, are evidently as various as those which belong to a fee-simple proprietor. Some of these have been referred to incidentally, in treating of the usual powers of administration. Such are powers of leasing and granting long leases; powers to submit and refer actions or claims; powers to invest in precarious securities, or to carry on a mercantile business. (f) In all cases where the power of a beneficiary to do a particular act, or class of acts, is limited by the common law, the trustee holding for his behoof is subject to the same restriction; a principle which may be illustrated by the case of trustees for liferenters, whose powers in regard to cutting timber and wasting the substance will be similar to those enjoyed by the liferenter under a direct disposition. It is of course competent to the truster to extend the powers of his trustees as he may think proper, in which case the responsibility of the trustee will be the same as that of any other gratuitous mandatory charged with the execution of the particular matter of business. He will not, in the general case, be liable for loss occasioned by transactions involving risk, into which he has entered at the request or by permission of his constituent. It is impossible to define with any hope of success the obligations and duties of trustees clothed with arbitrary powers. For our present purpose it may be sufficient to advert to the difference betwixt powers *directory* and *imperative*,—a distinction which must enter deeply into questions of liability.

1879. A directory, that is, a permissive power, may be given by a testator without any expectation that it will be used; and with no other object than that of leaving the trustee free to act in a particular way under circumstances not likely to occur. For example, a power of sale may be given to meet possible emergencies, although the intention plainly is, that the estate should be handed over to the heir unimpaired. Or a power may be given to trustees to con-

Powers directory and imperative distinguished.

(e) *Goodsir v. Carruthers*, 19 June 1858, 20 D. 1141; and see chapter 64, section 3 (Trusts for Sale).

(f) See *Reid v. Ainslie*, 7 Nov. 1862, 1 Macph. 9; *Cameron's Trs. v. Cameron*, 8 Dec. 1849, 3 Macph. 200.

tinue a business, if expedient, with the view of avoiding the loss that might accrue from winding-up too suddenly. It would be a great abuse of the confidence reposed in a trustee under such circumstances, if he were to interpret such powers as a license to conduct the trust affairs in an imprudent manner. The mere fact that the trustee is acting technically within his powers, will not always relieve him from responsibility for improvident management.^(g) But where a power is so worded as to have the force of a direction, the trustee has no alternative; his duty is to act upon the opinion of the truster in preference to his own; and the consequences of his obedience, however unfortunate, must be viewed as the act, not of the trustee, but of his constituent.

1880. Under the Trusts (Scotland) Act 1867 ^(h) jurisdiction is conferred on the Court, enabling it to grant additional powers to trustees. The most important sections are the 3d, 7th, and 8th. Powers which may be granted to trustees by the Court under the Trusts Act.

Section 3. "It shall be competent to the Court of Session, on the petition of the trustees under any trust-deed, to grant authority to the trustees to do any of the following acts, on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof; and the Court shall determine all questions of expenses in relation to such applications; and where it shall be of opinion that the expense of any such application should not be charged against the trust-estate, it shall so find in disposing of the application:

" 1. To sell the trust-estate or any part of it:

" 2. To grant feus or long leases of the heritable estate or any part of it:

" 3. To borrow money on the security of the trust-estate or any part of it:

" 4. To excamb any part of the trust-estate which is heritable. Provided always that when all the beneficiaries under the trust in existence at the date of presenting such petition are of full age and capable of acting, it shall be in their power, by deed of consent, to grant authority to the trustees to do any of the said acts, the same not being inconsistent with the intention of the trust; and such authority being obtained, the said acts, when done, shall be equally

^(g) The doctrine of the English law as to the responsibility of the donee of a power is thus stated by Mr Lewin (*Trusts*, 5th ed. p. 489)—"Where a power is given to trustees to do or not to do a particular thing at their discretion, the Court has no jurisdiction to lay a command or prohibition upon the trustees as to the exercise of that discretion, provided their conduct

is *bona fide*, and their determination is not influenced by improper motives." See on this point *Cowper v. Mantell*, 22 Beav. 281, and cases there cited.

^(h) 30 & 31 Vict., c. 97. See, as to the nomination of additional and new trustees by the Court, Chapter 56, sect. 2 (*Assumption, Appointment, etc., of trustees*).

CHAPTER LIX. valid and effectual as if the authority of the Court for the execution of the same had previously been obtained."

1881. By Section 4, sales of trust-estates may be either by public roup or private bargain, and with reservations of feu-duties or ground-annuals, and of mines and minerals.

Court may
authorise the
advance of part
of the capital of
a trust-fund.

Section 7. "The Court may from time to time, under such conditions as they see fit, authorise trustees to advance any part of the capital of a fund destined, either absolutely or contingently, to minor descendants of the truster, being beneficiaries having a vested interest in such fund, if it shall appear that the income of the fund is insufficient or not applicable to, and that such advance is necessary for, the maintenance or education of such beneficiaries, or any of them, and that it is not expressly prohibited by the trust-deed, and that the rights of parties other than the heirs or representatives of such minor beneficiaries shall not be thereby prejudiced."

By Section 8 of the same Statute, entailed money may be applied under the authority of the Court to the payment of debts or burdens affecting lands destined to the same series of heirs.

CHAPTER LX.

OF POWERS OF DISPOSAL.

1882. The most extensive power that can be conferred on a person who has not the *plenum dominium* of an estate is the power of disposal, which may be defined to be the faculty of regulating the disposition of the estate in a certain event, or under certain conditions. Viewed in its most general aspect, and as embracing every case in which rights of succession or new estates may be created in virtue of powers, the subject comprehends several distinct classes of powers, and in particular the three following:—In the first place, the settlor or testator, while reserving or constituting a life interest in his estate, may reserve to himself, with the life interest, the power of disposal of the fee, or may grant the like power to the life tenant by constitution; secondly, he may, while disposing of the entire estate, reserve to himself, or his heirs or donees, the power of granting family provisions to affect the estate; thirdly, he may, while disposing of money or estate to a plurality of persons, reserve to himself, or to another, the power of dividing or apportioning the fund amongst the objects of the gift. The present chapter relates to the first of the three classes of powers which are here distinguished.

Classification of powers of disposal.

1883. I. RESERVATION OF A POWER OF DISPOSAL WITH THE LIFE-RENT.—This combination of rights, of which the ordinary reservation in a *mortis causa* settlement is a familiar example, is equivalent to a fee-simple estate. The settlor is held to retain the full right of fee, even where the reservation in the settlement is, on the one hand, confined to a mere power of altering the succession; or, on the other, to a power of disposal for onerous causes.^(a)

Power of disposal reserved with the life-tenant, held to be equivalent to a fee.

1884. The rule has most frequently been applied to cases of life interests by reservation, where a general power of disposal is also reserved by the grantor of the deed. Where a person retains the

Principle and limits of application of the rule.

^(a) Where, however, the limitation is contained in a marriage-contract, it will be binding *ex obligatione*; *Collart v. Corrie*, 26 March 1853, 15 D. 606.

a reserved power of disposing, and to his son in fee. This, although in form a liferent by constitution, was treated as a reserved liferent, as the destination was held to be inserted in the title by the authority of the purchaser. The purchaser having died without exercising his reserved power, his son was held to take the lands in the character of an heir of provision, and not as a donee, and to be under an obligation to collate the estate as a condition of claiming a share of the moveables.

1887. The cases above mentioned are examples of the construction of a general power of disposal in conjunction with a liferent by reservation, and with a destination over. Where the reserved power merely enables the liferenter to alter the order of succession but not to sell, or, conversely, to alienate for onerous causes but not to alter the succession, the argument for holding it to be equivalent to a fee is proportionately weakened; (*f*) and we shall see that, even in the case of liferents by constitution, the generality of the power is an element of importance. Some cases on the construction of reserved powers of appointment of a more restricted nature may now be noticed.

Effect of reserved liferent with a limited power of disposal.

1888. In the case of *Ramsay v. Cowan* (*g*) the truster, by his marriage-settlement, conveyed away the general residue of the whole personal estate of which he should be possessed at his death; but not so as to debar him from affecting it "by acts of fair expenditure, or absolute disposal, *inter vivos*, operating against himself." This was held to import a liferent in the truster, with a power of disposal, *inter vivos*, either gratuitously or for onerous causes, but not *intuitu mortis*; and accordingly, a subsequent deed, intended to create interests of fee and liferent prejudicial to the heirs of the marriage-contract, was found to be ineffectual to alter the succession. In deciding that the truster had not an unlimited fee, the fact of the power being given in a marriage-settlement received considerable weight. In *Coltart v. Corrie* (*h*) a power to sell, reserved in a mutual settlement by husband and wife, "should they find it necessary for their support to do so," was held to be qualified by the condition attached to it; and a disposition, bearing to be a recompense for past services, was reduced.

Liferent and reserved power of disposal *inter vivos*.

Mutual settlements.

1889. An entailer may reserve power to nominate additional heirs, and such a power may be exercised after the completion of a

Effect of reserved power to alter the succession.

(*f*) See *Glendonwyn Scott v. Maxwell*, 22 May 1850, 12 D. 933, affirmed, 1 Macq. 791, a case of a provision by a wife to a husband under a mutual settlement subject to a power of this nature.

(*g*) *Ramsay v. Cowan*, 11 July 1888, 11 Sh. 967.

(*h*) *Coltart v. Corrie*, 26 March 1858, 15 D. 606.

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title upon the original entail.⁽ⁱ⁾ In the case of *Porterfield*,^(k) where a power to nominate heirs was reserved by the entailer, it was held that the power was exercised by the entail of another estate, declaring that the heirs therein called should be the heirs of the first-mentioned entail. In this case, the heir first called to the succession by the original entail had made up a title under it, passing over the deed of appointment, and possession was had on that title for more than forty years by persons who were heirs under both destinations. But on the succession opening to the heirs specially called by the deed of appointment, it was held to be the regulating deed, and that the right of succession which it conferred, being *jure facultatis*, was not affected by prescription.

General rule.

1890. The cases on powers by reservation were reviewed in *Morris v. Tennant*^(l) by Lords Cranworth and St Leonards, in whose opinions the doctrine is explicitly laid down, that a liferent by reservation with a power of disposal is equivalent to a fee.

Conveyance in
liferent, coupled
with power of
disposal, does
not carry the
fee.

1891. II. GRANT OF POWER OF DISPOSAL TO A LIFERENTER BY CONSTITUTION.—The rule of construction in this class of cases is, that a liferenter by constitution, even when armed with the most general power of disposal, is not a fiar; and that the appointee of the liferenter, or failing such an appointment, the disponent under the destination over, takes the estate not as the heir of the liferenter, but as the heir of the granter of the power.^(m) In most of the cases we are about to notice the conveyance was made, in the first instance, to trustees; and powers of disposal, variously expressed, were conferred on the parties to whom the annual proceeds of the estate were directed to be paid over. The interposition of a trust for the purpose of keeping the fee and liferent distinct, would of course make it more difficult to suppose that a constructive fee was given to the liferenter; but the decisions do not appear to have gone very much on this consideration; and accordingly we find, in the case of *Baine v. Craig*, where there was a direct mutual disposition between spouses to their own liferent use, fee to the children, subject to a power of disposal, the Court did not regard the addition of the power as equivalent to a fee in the liferenters, but gave effect to the destination, according to the natural meaning of

(i) *Porterfield v. Stewart*, 1 Sh. 9, N. E. 6; remitted, 2 W. & S. 369; opinions, 8 Sh. 16; judgment of affirmance, 28 Sept. 1831, 5 W. & S. 515. See also *Earl of Strathmore v. Strathmore's Trs.*, 15 Sh. 449; 30 July 1840, 1 Rob. 189; *Fraser v. Lord Lovat (Abertarff)*, 28 Feb. 1842, 1 Bell, 105.

(k) *Porterfield v. Stewart*, *supra*.

(l) *Morris v. Tennant*, in H. L. 6 July 1855, 27 Jur. 546; 26 March 1858, 30 Jur. 493.

(m) On this principle, the heirs of the destination over were held entitled to confirm as executors of the fee, notwithstanding the existence of a partial power of disposal; *M'Gown v. Kinlay*, 4 Dec. 1835, 14 Sh. 105.

the words, to the extent of the one-half of the property to which they assumed the wife had right.⁽ⁿ⁾ CHAPTER LX.

1892. In the recognition of this doctrine, effect is given to the reasons which the testator may be supposed to have for withholding the full and absolute dominion of the property, while giving to his immediate heir a voice in the disposal of it. For example, a testator may wish the capital to be left in the hands of trustees during the lifetime of his widow or daughter, with the view of constituting an alimentary provision in her favour, and may at the same time be willing that she should be as entirely unfettered in the disposal of the fee as if the property were her own. Or he may be willing that any appointment of heirs by the liferenter should receive effect in preference to the rights of his heirs; and may yet prefer his own heirs-at-law to the heirs-at-law of the liferenter, who would of course be entitled to the succession if the conveyance were absolute. Again, it may be desirable to give the use of the capital to the liferenter as a fund of credit, with a power of sale to meet emergencies; in which case the power of disposal will be a general one. It is on such considerations as these that the rule of interpretation applicable to faculties of disposal mainly depends.

1893. The effect of a disposition in liferent, with a power of appointment, underwent elaborate discussion in three leading cases, each raising the question in a different way. In the case of *Weddell or Ness*,^(o) a power was given to the testator's widow to appoint by testamentary deed; and the power having been exercised, an action was raised in the Court of Exchequer to try the question, whether the estate was subject to inventory-duty as property of the widow. In *Morris v. Tennant*^(p) the question related to the exercise of the power of appointment on deathbed; in *Alves v. Alves*^(q) the competition was between the heirs of the liferenter and the truster's residuary legatees. The opinions of the judges who decided *Weddell's* case are elaborate and instructive. The result at which the Court of Exchequer arrived was, that an appointee, under authority of a deed which empowered the liferenter to bequeath the fee by testamentary deed, was the heir of the maker of the power, and not of the party exercising it—a result which is obviously inconsistent with the notion of a fee in the person of the liferenter.

1894. In *Morris v. Tennant* a power was given to a liferenter of certain funds under trust, to “settle, destine, and convey” the

Explanation of the doctrine.

Examination of the leading cases upon powers of disposal.
Re Weddell.

Morris v. Tennant.

⁽ⁿ⁾ *Baine v. Craig*, 8 June 1845, 7 D. 845.

^(p) *Morris v. Tennant*, *supra*.

^(q) *Alves v. Alves*, 8 March 1861, 23 D.

^(o) *Re Weddell*, 8 Feb. 1849, Exchequer Reports. 712.

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fee in a certain event, with a destination to other parties in case of failure. It being admitted that a power might be exercised on deathbed, the question argued before the House of Lords was, whether an appointment under this clause (executed on deathbed) could receive effect as an exercise of the power, or must be regarded as a conveyance of the fee; the argument for the liferenter's heir-at-law being, that a liferent, coupled with a general power, was equivalent to a fee-simple, distinguishing from *Weddell's* case, in which the power was to be exercised by testamentary deed. The decision, as stated in Lord St Leonards' exhaustive analysis of the law, was, that a liferent coupled with the largest and most general power of disposal, *and with a destination over*, could not be construed as a fee.

Whether the interest given amounts to a constructive fee where there is no ulterior destination of the estate.

1895. The construction of a general power superadded to a liferent, *without an ulterior destination*, has not been finally determined. In the decisions referred to reliance was placed upon the contingent interest of the person instituted, in default of an appointment under the power, as sufficient to prevent the fee from vesting in the liferenter. The nearest approach to the case of a liferent with a general power, but without a destination over, occurred in the case of *Alves v. Alves*.^(r) A liferent of a certain share of moveable succession was given to the testator's widow, with a general power of appointment. There was no express destination over; but the Court were of opinion that there was a sufficient residuary destination in a previous settlement to exclude the next of kin, whether of the testator or of the liferentrix.

General and limited powers of disposal distinguished, with reference to their construction, by Lord Westbury.

1896. The distinction between general and limited powers of appointment is very clearly drawn in the following passage, which we quote from the opinion of Lord Westbury in the case of *Pursell v. Elder*:—"If an estate or sum of money be given to an individual who is *sui juris*, without words of limitation or a declaration of the extent of his ownership, but with words indicative of the intention of the testator that he should have the absolute *jus dispo-*

(r) *Alves v. Alves*, *supra*. Lord St Leonards observes (Powers, 8th ed., chap. 4, sec. 1, § 9), "A devise to A. for life, expressly, with remainder to such persons as he shall *by deed or will* or otherwise appoint, will of course not give him the absolute interest, although he may acquire it by the exercise of his power; *Barford v. Street*, 16 Ves. 185; *Hughes v. Wells*, 9 Hare, 767; and the rule applies to personal estate as well as to real estate, *Reith v. Seymour*, 4 Russ. 268; *Scott v. Josselyn*, 26 Beav.

174." And in the same page (§ 11), he adds, "It is said that where an estate is given absolutely, without any prior limited interest, to such uses as a person shall appoint, it would be an estate in fee; see 3 Ves. 470; *Lord Townsend v. Windham*, 2 Ves. sen. 1; *Hales v. Margerum* 3, Ves. 299; *Cook v. Duckenfield*, 2 Atk. 565. But this doctrine refers only to a devise; for in a conveyance such a limitation would merely confer a power on the party, and not give him an estate in fee."

endi, then, in any case, those words are to be taken as indicating an intention that he should be the absolute owner. Thus, if I give an estate to A. B., to do therewith as he pleases, to give to such persons as he shall think fit, and to deal with it at his will and pleasure, all those expressions are nothing more than a form of denoting absolute ownership, and the intention to give absolute ownership. But if a gift is made to a *feme covert*, and provision is made for her children, and then these words are annexed to the gift, that in the event of her having no children, the property is committed to her discretion alone, as she may thereafter think fit to deal with it, those are words which, having regard to the reference to her discretion, and to the cause for the exercise of that discretion, and to the fact that they are annexed to a gift made to a *feme covert* who is not *sui juris*, must, I think, in conformity with every principle, and, so far as I know, in conformity with every authority, be held to amount only to an indication of intention that the *feme covert* shall have a power of appointment or of disposition, and not to be indicative of an intention that the *feme covert* shall become the absolute owner.”(s)

1897. Where the liferent of a sum of fixed amount is charged on residue, so much upon the share of one child, and so much on that of others, and a power of disposal of part of the capital is added; then, in the event of the power being exercised, the residuary shares suffer abatement in the proportions in which the liferent interest was chargeable upon them respectively.(t)

Abatement of legacies in consequence of the exercise of such powers.

1898. III. EXERCISE OF POWERS OF DISPOSAL.—Although it is an established principal that an appointee does not take the estate as heir of the donee of the power, but as heir of the granter of the power, it has been decided that the donee’s general disposition, executed *intuitu mortis*, and even on deathbed,(u) carries the estate, on the principle that it is an implied exercise of the power of disposal vested in him.(x)

General disposition is a valid exercise of a power of disposal.

1899. In *Smith v. Milne*(y) an executrix, under the will of her husband, was directed to hold the testator’s funds for payment of debts and legacies, and *inter alia* for payment of an annuity to herself of £50 per annum, subject to certain conditions, with a declaration, that “in case she do not again marry, she is to be entitled to dispose of the residue of my fortune amongst our children after

“Residue” includes property subject to a power.

(s) *Pursell v. Elder*, 13 June 1865, 3 Macph. H. L. 59, 68.

(t) *Bogle v. Bogle*, 16 Sh. 1271.

(u) *Ersk.* 3, 8, 98.

(x) *Cameron v. Mackie*, 29 Aug. 1833, 7 W. & S. 106. See the Lord Chancellor’s

observations, p. 139. *Grierson v. Miller*, 8 July 1852, 14 D. 939; *Baine v. Craig*, 8 June 1845, 7 D. 845; *Smith v. Milne*, and *Hyslop v. Maxwell*, *infra*.

(y) *Smith v. Milne*, 6 June 1826, 4 Sh. 679, N. E. 685.

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her death, in such proportions as she thinks proper." There was no destination over; and the lady, who had never any property of her own, left a will, appointing executors, without any reference to the power of appointment conferred on her by her husband, and giving and bequeathing *the whole free residue of her subjects and effects* to her children therein named, in certain proportions. The judges were unanimously of opinion that the will was a good exercise of the power of appointment; and the absence of any ulterior destination in the husband's will was adduced as explanatory of the circumstance, that the executrix had disposed of the property in her own name.

Power exercised by leaving previous general settlement unrevoked.

1900. So, also, where a power was given by a testator to his niece, "by will or other deed under her hand, to dispose of and convey as she may think proper, after her decease, the capital sum of £2000, to be set apart by my trustees for answering her annuity," it was held that the niece's general settlement executed before the death of her uncle and therefore before *his* settlement took effect, was sufficient to carry the fee of the money left subject to her disposal.(z) Powers of disposing of shares of the price of heritable property directed to be sold, and of funds invested on heritable security, have been held to be effectually exercised by testament;(a) and on principle, it may be affirmed that dispositive words are not essential. A power of disposal conferred on trustees is sufficiently exercised by a deed disposing of the specific fund. The recital of the power is not essential to the validity of the deed of appointment, though in practice it is never omitted.(b)

Exercise of limited powers of disposal.

1901. When a power is reserved of altering the order of succession, it would seem that one deed of alteration will not exhaust the power.(c) The deed of appointment must, of course, be a deed of the nature contemplated by the truster. And therefore, where the original deed of settlement reserved to the granter a power of affecting the property by acts of fair expenditure or absolute disposal *inter vivos*, it was held that a power in those terms did not entitle the granter gratuitously to alter the succession to the property.(d) And where a party, by his antenuptial contract, conveyed his estate to the heirs of the marriage, and reserved a power to make an entail, prohibiting alienation and the contracting of

(z) *Hyslop v. Maxwell's Trs.*, 11 Feb. 1884, 12 Sh. 418.

(a) *Grierson v. Miller, supra*; *Smith v. Taylor*, 17 Feb. 1886, 14 Sh. 502.

(b) *Cunninghame v. M'Leod*, 12 Aug. 1846, 5 Bell, 252, 257, *per* Lords Brougham and Campbell.

(c) *Glendonwyn Scott v. Maxwell*, 22 May 1850, 12 D. 932; affirmed, 1 Macq. 791.

(d) *Ramsay v. Cowan*, 11 July 1833, 11 Sh. 967.

debt, it was held that an entail subsequently executed, which prohibited alteration of the succession, was *ultra vires* of the contract.^(e) And it was held by Lord Mansfield that a power to settle an heritable estate in Scotland on a younger child, could not be exercised by giving it to a grandchild.^(f)

1902. Where a liferenter is invested with a general power of disposal by deed, a variety of questions may occur regarding its execution *inter vivos*, the solution of which will depend upon the nature of the original settlement. If the property is held under a *direct conveyance* in liferent, with a general power of appointment and a destination over, it is clear that, as soon as an appointment is made by a deed *inter vivos*, the fee will vest in the appointee subject to the burden of the liferent, and the contingent reversionary interest will, *ipso facto*, become discharged. Further, there can be no impediment in the case supposed to a discharge of the liferent, with the view of conferring an absolute fee upon the appointee. But if we suppose the case of a settlement which vests the property in *trustees*, with a direction to pay over the annual proceeds to the settlor's widow or daughter during her lifetime, subject to a general power of appointment in her favour, the question is attended with greater difficulty. We should consider that in that case (especially if the fund were declared *alimentary*) the party would not be safe in accepting a discharge by the liferentrix, and transferring the property to her appointee.^(g) However, there is room for maintaining that the consent of the lady and her guardians would validate the transaction, on the principle that there would then be no party *in titulo* to call the trustees to account as for a breach of trust.

Exercise of a power conferred by direct conveyance in liferent and fee.

Discharge of the liferent makes the fee vest absolutely.

1903. The decisions of the Court, however, have gone somewhat beyond the line indicated in the preceding paragraph; and it must now be considered a settled point, that a liferentrix under trust may, at any time, tender a discharge of her interest, and call upon the trustees to denude in favour of the fiar. In the case of *Martin v. Bannatyne*, which we are about to notice, the disposition of the fee was contained in the settlement; but the principle is necessarily the same where the fee is constituted by a liferenter acting in virtue of a general power of appointment. In the case of *Pretty v. Newbigging*,^(h) a fund was conveyed to marriage-contract trustees for the purpose of providing an annuity to the widow, and after her

If liferentrix discharge her interest, appointee may demand a conveyance from the trustees.

^(e) *Macneil v. Macneil's Trs.*, 27 Jan. 1826, 4 Sh. 898, N. E. 896; *Macleod v. Macleod*, 1 July 1828, 6 Sh. 1048.

^(f) *Cunynghame v. Cunynghame*, 1777, 2 Pat. 434.

^(g) See opinion of Lord Deas in *Balderston v. Fulton*, 28 Jan. 1857, 19 D. 299.

^(h) *Pretty v. Newbigging*, 1 March 1854, 16 D. 667.

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death to be divided among the children of the marriage. The lady survived her husband; and upon her only son coming of age, she renounced the liferent and obtained decree against the trustees, finding that they were bound to denude in favour of her son. We may remark, that the settlement, which was *not alimentary*, contained a destination over to the truster's grandchildren in case of the death of any of his children before the fund should be paid or become payable. Lord Rutherford held, that in a *mortis causa* settlement such a clause would have prevented the vesting of the fee until the expiration of the liferent, by reason of the grandchildren being called as conditional institutes; but in a marriage-contract, he thought the presumption was for immediate vesting. The whole Court was eventually consulted, and the Lord Ordinary's finding was adhered to, Lord Justice-Clerk Hope dissenting in an elaborate opinion. It would seem, therefore, that a liferenter with a general power of appointment may indirectly transfer the entire estate, by appointing to the fee and afterwards discharging the liferent.

Similar result where life-rentrix acquires the fee by succession.

1904. In the case of *Martin v. Bannatyne*,⁽ⁱ⁾ the same question was raised in a different form. There was a conveyance in the marriage-contract of thirty bank shares to the spouses in conjunct liferent, with a liferent to the survivor as an alimentary provision for self and children; and failing children, to the widow, her heirs and assignees in fee. There were no children; and accordingly Lord Neaves, and afterwards the Court, sustained the widow's *jus exigendi* as far in an action against the trustees. Another fund was destined in similar terms, with this difference only, that the fee was vested in the husband, who, by a testamentary settlement, appointed his wife his sole executrix. With respect to this fund also, the Court, altering the judgment of the Lord Ordinary, held that the widow was entitled to immediate payment, on the ground that, as the liferent was made alimentary by marriage-contract, the restriction on the right of alienation was intended to protect the property against the husband's deeds, and fell with the dissolution of the marriage. Even in the case of a provision secured by a testamentary writing, its alimentary character will subsist, pending the marriage, notwithstanding the union of the liferent with the fee. Thus, in *Balderston v. Fulton*,^(k) where the fee had vested (in default of nearer heirs) in a lady who already liferented the property under a trust excluding her husband's *jus mariti*, the Court refused to order the money to be paid over to her husband.

Exception when marriage subsisting.

(i) *Martin v. Bannatyne*, 8 March 1861, 28 D. 705.

(k) *Balderston v. Fulton*, 28 Jan. 1857, 19 D. 298; see *Torry Anderson v. Buchanan*, 2 June 1837, 15 Sh. 1073.

1905. The nature of the right conferred on the party who is invested with a *general* power of appointment, would seem to argue that such powers may be executed for the benefit of the creditors of the donee of the power; because there is, *ex hypothesi*, no restriction on his power of appointment. This was assumed in two of the earlier cases, *Rollo v. Rollo*,^(l) and *Watt v. Tawse*.^(m) It would seem, however, from the decision in the former case, that the appointment must be express; a general disposition to creditors not being effectual to carry an estate, over which the disponent has only a *jus facultatis*. At the period of that decision, the law was still unsettled on the question, whether a liferent with a power of disposal amounted to a fee; and the decision was still further complicated by the consideration, that the property was vested in trustees for the very purpose of protecting it from the diligence of the donee's creditors. And the Court seem to have been of opinion that there was no intention, on the part of the donee of the power, of including the property in question amongst the subjects conveyed by his general disposition.⁽ⁿ⁾

Exercise of power by appointment in favour of creditors.

1906. Another question argued in the case of *Rollo*, was, whether the creditors of the donee of the power have a preferable claim to the property, and whether such creditors could compel the donee to exercise the power in their favour. In support of the affirmative, reliance was placed on the *dictum* of Lord St Leonards, who observes, "Equity holds, that where a man has a general power of appointment over a fund, and he *actually exercises the power*, whether by deed or will, the property appointed shall form part of his assets, so as to be subject to the demands of his creditors, in preference to the claims of his legatees or appointees."^(o) These questions are still open. The doctrine laid down by Lord St Leonards in deciding the case of *Morris v. Tennant*,^(p)—namely, that there is no fee in the donee of the power under the English or Scotch law—is certainly adverse to the recognition of any claim on the part of his creditors as against the appointee. The forms of procedure in our law are also opposed to the notion of enforcing a party to execute a deed which he is merely under a moral obligation to grant. It is clear, to our thinking, that a discretionary power of appointment could not be attached by adjudication, so as to enable the

Whether creditors may enforce the execution of a power of disposal for their own advantage.

^(l) *Rollo v. Rollo*, 26 Jan. 1848, 5 D. 446.

^(m) *Watt v. Tawse*, 21 Nov. 1829, 8 Sh. 107.

⁽ⁿ⁾ Where a power of disposal is given to a liferenter to be exercised by a *mortis causa* deed, it would seem that such a

power cannot be exercised in favour of creditors; *Colville v. James*, 21 Nov. 1862, 1 Macph. 41.

^(o) Sugden on Powers, 8th ed., chap. 9, sect. 8, § 11.

^(p) *Morris v. Tennant*, 27 Jur. 546.

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creditors to execute it in favour of a trustee for themselves; and we suspect that the creditor's only remedy would be by the use of personal diligence for his debt, under the pressure of which the donee might be induced to exercise the power, and so to convert his inchoate interest into a right more directly available to his creditors. (q)

Exercise of a general power of appropriation.

1907. Sometimes a power is given to a liferenter to appropriate the fee of the property. (r) Such powers are rarely given, and we are not aware of any case in which a power of this nature has been the subject of judicial construction; but there can be no doubt of the competency of conferring such a power. No conveyancer would hesitate to accept a title founded on the exercise of a power of appropriation. It is much more common, however, to confer upon a liferenter the power of encroaching on the capital, in so far as necessary for support. Such powers are to be interpreted liberally, the extent of encroachment being in the discretion of the party. But a power of appropriating for one's own use, without limitation as to the amount, will not entitle the appointee to dispose of the property by will or *mortis causa* disposition. (s) A power of appropriation may be restricted to a particular subject. For example, a testator having left to a lady, resident in his house, "the whole of the furniture in her own bedroom, and any other she may choose for furnishing her house," this provision was interpreted by the Court to mean a power of choosing liberally, but fairly, any other articles of furniture of similar extent and value with the furniture of her own bed-room. (t)

Whether a life-rent interest may be limited in virtue of a power of disposal.

1908. The question has been discussed, whether a power of appointment may be validly exercised by a disposition conveying the life-rent and fee as separate estates. The question involves two points: (1) As to the lawfulness of such destinations *per se*; and (2) As to the extent of the donee's authority under the power.

Objection on the ground of accumulation.

1909. The first ground of objection arises from the circum-

(q) On the general question of the competency of attaching a power by adjudication, see Stair, 8, 2, 16; Ersk. 2, 12, 6; *Wedderburn v. Colville*, 1789, M. 10,426; *Baird v. Morrison*, 1698, 4 Br. Sup. 96; and opinions in *Cochrane v. Bogle*, 2 Mar. 1849, 11 D. 908.

(r) It is clear that under a *general* power the donee may appoint himself. "A general power," says Lord St Leonards (*Powers*, 8th ed., chap. 8, sec. 1, § 4), "is, in regard to the estates which may be created by force of it, tantamount to a limitation in

fee, not merely because it enables the donee to limit a fee, which a particular power may also do, but because it enables him to give the fee to whom he pleases; he has an absolute disposing power over the estate, and may bring it into the market whenever his necessities or his wishes may lead him to do so."

(s) *Sprot v. Pennycook*, 12 June 1855, 17 D. 840.

(t) *Reed v. Strathallan*, 11 Feb. 1834, 12 Sh. 426.

stance that the Legislature has prohibited the creation of liferents to endure beyond the lifetime of parties in being at the date of the settlement, with the addition of the years of minority—the prohibition being now extended to settlements of heritable property in Scotland by the 47th section of the Entail Amendment Act. It has been thought that, as the estate of the appointee is held to flow from the maker of the power, the donee could not give a liferent interest to a party born after the date of the settlement, although *in esse* at the execution of the power. Lord St Leonards discards this view as applicable to a *general* power; for, says he, “to take a distinction between a general power and a limitation in fee, is to grasp at a shadow whilst the substance escapes. By the creation of the power, no perpetuity, not even a tendency to a perpetuity, is effected.” (u) “With respect to particular powers,” observes the same learned author, “they have a tendency to perpetuity, which is not obviated by their enabling the donee to limit the fee; for although the donee can dispose of the fee, he cannot, through the medium of a particular power, dispose of the estate *as if he were seized in fee* of it. It is well established, therefore, that under a particular power, as a power to appoint to children, no estate can be created which would not have been valid if limited in the deed creating the power.” (x)

1910. Secondly, as to the extent of the donee’s authority, there is no reason to suppose that a general power of appointing to the fee of estate, whether given to a liferenter or to a trustee, would not authorise the limitation of a new liferent. (y) For the donee might assume the fee, and thereafter dispoise the property with such limitations as he pleases. The recent case of *Oxley’s Trs.*, noticed in the sequel, merely decided that the particular powers conferred by a certain deed of settlement were not such as to authorise a disposition of the liferent interest to one child and the fee to another.

Distinction in the case of a general power.

1911. The effect of a failure to exercise a power of disposal, is to vest the reversion or fee, on the expiration of the liferent interest, in the person nominated in the ulterior destination, or, if there be no such person, then in the residuary legatee. (z) As already mentioned, it has not been decided whether the succession falls to the heirs of the granter, or to the heirs of the donee of a general power, when the settlement contains no residuary destination.

Disposal of fee on failure to execute power.

(u) Sugden on Powers, 8th ed., chap. 8, sect. 1, § 5.

(x) Powers, 8, 1, 6, citing *Massey v. Barton*, 7 Ir. Eq. Rep. 95.

(y) *Currie v. Currie*, 22 Jan. 1885, 18 Sh. 290.

(z) *Alves v. Alves*, 18 Mar. 1861, 23 D. 12; *Pursell v. Elder*, 18 June 1865, 3 Macph. H. L. 59; 4 Macq. 992; and see *Dundas v. Dundas*, 27 Jan. 1837, 15 Sh. 427; *Henry v. Grant*, 19 Feb. 1824, 2 Sh. 725, N.E. 605; *M’Lean v. M’Lean*, 5 Br. Sup. 444.

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CHAPTER LXI.
OF POWERS OF APPOINTING PROVISIONS.

I. *Powers under Marriage-Contracts.* | II. *Powers under Deeds of Entail.*

SECTION I.

POWERS RESERVED UNDER MARRIAGE-CONTRACTS.

Such powers reserved by implication in testamentary settlements;

but must be expressed in marriage-contracts and deeds of entail.

General settlement by marriage-contract, whether inconsistent with retention of powers of appointment.

1912. A truster executing a settlement by which he places his property beyond his control, by settling it on his heirs, may desire to reserve to himself the faculty of making provisions out of the estate for other members of his family. If the settlement is upon a series of heirs, as in the case of an entail or a continuing trust, he may confer a similar power upon those who are to succeed him in the possession of the property, or upon the trustees of his succession. It is not necessary in testamentary instruments to reserve such a power to the granter himself; and accordingly, it will be seen that the cases relating to reserved powers of this description have arisen chiefly upon the construction of marriage-contracts and deeds of entail. The construction of such powers is not much affected by the nature of the deed by which they are created; and we prefer, therefore, to take a general view of the subject,—distinguishing, however, between a power of burdening the estate with provisions, and a power of division.

1913. It is a general principle affecting the construction of all deeds making provision for children, that, unless the property be conveyed, and that specifically, the father is understood to reserve the power of affecting the property by onerous deeds, which will be preferable to the claims of the children.(a) In accordance with this principle, it has been held that a destination of property in a marriage-contract to the spouses in liferent, and the children of the marriage in fee, does not limit the husband's *jus mariti*, or exempt the property from liability for his debts.(b) Payment of provisions

(a) *Herries, Farquhar, & Co. v. Brown*, 10 Mar. 1838, 16 Sh. 948. (b) *Jameson v. Strachan*, 27 Jan. 1835, 13 Sh. 818.

granted to children in pursuance of a reserved power, will therefore be postponed to the claims of onerous creditors, even although the children may have been infeft in security; and should they have received payment from the heir, they will be liable for their father's debts to the extent of the sums received.(c) If the provisions have been secured by infeftment in the name of marriage-contract trustees, the order of liability will resolve into a simple question of ranking, creditors completing a prior title being preferred to the trustees.(d) It has been decided that a married woman, on whom a power of appointing to a limited extent has been conferred by marriage-contract, may exercise the power without her husband's consent—his assent to the faculty being sufficient.(e) A power to appoint *with the husband's consent*, falls by his death.(f)

1914. The first point to be considered is, to whom an appointment may be made under a power to appoint to children, which involves the important and as yet unsettled question, how far a father who has conveyed the whole or the bulk of his property to the children of a first marriage, or to trustees for their benefit, can be considered to retain an implied power of revocation to the extent of making a reasonable provision for the wife and children of a second marriage.(g) In *Guthrie v. Cowan or Bell*,(h) the father having disposed his whole property to trustees for behoof of the surviving spouse in liferent and the children in fee, the First Division were equally divided on the question, whether a postnuptial contract in similar terms for behoof of the second wife and her children could receive effect as an onerous obligation. In support of the affirmative, reliance was placed on the authority of *Erskine and Bell*,(i) to the effect that a postnuptial contract is effectual against creditors to the extent of a moderate provision, in respect of the husband's natural right to aliment his wife. Minutes of debate were ordered, but the case was compromised. It has since been settled by a majority of the whole Court, in *Wilson's Trs. v. Pagan or Wilson*,(k) in construing a provision in liferent and fee to the widow and children of a second marriage, that the widow was entitled to be ranked as an onerous creditor, but that

Whether a reasonable provision may be made for children of a second marriage out of a settled fund.

(c) *Poole v. Anderson*, 22 Feb. 1834, 12 Sh. 481.

(d) *Macgregor v. Macdonald*, 9 Mar. 1843, 5 D. 888.

(e) *Innes v. Farquharson*, 1692; 4 Br. Sup. 30.

(f) *Borthwick v. Trades Maiden Hospital*, 1737, M. 4095.

(g) *Brodie's Trs. v. Mowbray's Trs.*, 12

Nov. 1840, 8 D. 31; *Cowan's case and Wilson's Trs.*, *infra*. See cases in 1 Fraser, 794.

(h) *Guthrie v. Cowan or Bell*, 21 Nov. 1846, 9 D. 124.

(i) *Ersk.* 4, 1, 83; 1 *Bell's Com.*, 5th ed., 642; and *Campbell's case*, there cited.

(k) *Wilson's Trs. v. Pagan or Wilson*, 2 July 1856, 18 D. 1097.

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the children had no *jus crediti* in a question with the children of the first marriage claiming legitim, the provision not having been made payable at a period which might arrive before the death of the father. (l)

Whether a power to appoint of new is equivalent to a revocation of existing provisions.

1915. In the case of *Mitchelson v. Mitchelson*, (m) a father had directed the trustees of his *mortis causa* settlement to pay £2000 to each of his younger daughters, and to convey the estate to the eldest. On entering into a second marriage, he bound himself to settle the estate upon the heirs-male of the marriage, to pay £1000 to each of the younger children thereof, and reserved power to burden the estate with reasonable provisions to his daughters by the first wife. Although the reserved power was never exercised, the Court held it to be equivalent to a revocation of the fixed provisions bequeathed to the daughters by the prior trust. We do not suppose that this case would now be followed as a precedent. It appears to be opposed to the doctrines laid down by the House of Lords in connection with the ademption of legacies in the more recent case of *Kippen v. Darley*. (n)

Appointees rank preferably to the heir in case of insufficiency of the fund.

1916. Where estate is destined by marriage-contract to the heir, subject to a power of burdening with provisions to younger children, bonds of provision granted in virtue of the power are preferable, in a competition with the heir. (o) This principle was strongly exemplified in the case of *Russell v. Russell*. (p) The estate was there destined to the eldest son, subject to provisions to the extent of £8000 in favour of younger children; but in consequence of debts afterwards contracted, the free estate only yielded £6000. The claim of the younger children was sustained, to the entire exclusion of the heir; and the shares of children dying in minority, which were declared by the settlement to belong to the eldest son, were charged with the deficiency. A power of altering the amount of a burden imposed on the heir of the marriage is not held to be exercised by laying a burden on him as executor. Both provisions are exigible. (q)

(l) In the English case of *Coleman v. Seymour*, 1 Ves. sen. 209, a father gave £3000 to a married daughter for the use of her younger children, to be distributed amongst them as she should appoint; and Lord Hardwicke determined that the gift did not extend to her children by a second marriage; and he was further of opinion that it extended only to children living at the making of the will, or, at furthest, at the death of the testator. But where a liferent is limited to a parent, *with remainder to his unborn children as he shall appoint* (which is the usual form in English mar-

riage-settlements), it would seem that the power embraces all the children; Sugd. Powers, 8th ed., chap. 16, sec. 1, § 81.

(m) *Mitchelson v. Mitchelson*, 15 Nov. 1820, F.C. See *Hamilton v. Hamilton*, 1741, M. 4137, 11,576.

(n) *Kippen v. Darley*, 21 May 1858, 3 Macq. 203, affirming 18 D. 1187.

(o) *Erskine v. Erskine*, 24 May 1827, 5 Sh. 696, N.E. 650.

(p) *Russell v. Russell*, 25 Feb. 1835, 13 Sh. 551.

(q) *Frew v. Frew*, 15 Feb. 1828, 6 Sh. 554.

1917. Provisions in favour of younger children are regarded as burdens affecting the estate, if made binding on the heirs generally, irrespective of the mode in which such provisions may be constituted.^(r) And, therefore, in a case where provisions to children were constituted by personal bond, payable by the heirs succeeding the grantor in certain estates, and the heir first succeeding died without having made payment, it was found that the debt was a burden on the heir next succeeding, and not upon the executors of the first-mentioned heir.^(s) In the event of the heir becoming insolvent at the period when the succession opens to him, the children, whose provisions have been made chargeable against the bankrupt heir, rank as personal creditors upon his estate *pari passu* with other creditors;^(t) and if the provisions have been heritably secured, they will be preferable, notwithstanding the supervening bankruptcy of the heir within sixty days after the infestment.^(u)

Bonds of provisions binding the heir are burdens on the heritable estate.

1918. Sometimes a discretionary power of securing provisions is conferred upon trustees; in which case they must be guided by the directions of the testator in so far as his intention has been expressed. A declaration by a truster in the following terms,—“I am aware how very incorrect all these writings are; and I hereby empower my brother to alter any part of them he may think proper,”—was held not to import a power of altering the destination of any part of the property; but to be merely a precatory direction to execute such deeds as might be necessary for the purpose of giving effect to the intention.^(x) In the case of *Dennistoun v. Dalgleish*,^(y) the trustees having been directed to invest sums of £20,000 for behoof of each of the testator's three daughters, “in such terms and manner that the relative writs or documents shall be payable or prestable to the said respective legatees themselves, or trustees for their or her behoof, in liferent, and their or her issue in fee,” the Court found that the provisions were not to be paid to the daughters, but to be secured for them in liferent, and their children in fee. And although a power of providing may have remained in abeyance beyond the period when the trustees were directed to exercise it, the beneficiaries will not lose the benefit of the provision, but may call upon the trustees to execute the power while any of their number are surviving.^(z) And in one case, where an heir of entail en-

Powers of appointment given to trustees, their construction and effect.

(r) *Cleghorn v. Elliot*, 18 Jan. 1833, 11 Sh. 259.

(s) *Macdonald v. Lord Macdonald*, 29 May 1832, 10 Sh. 584.

(t) *Miller v. Wright*, 5 July 1836, 14 Sh. 1087.

(u) *Manfield v. Stuart*, 13 Feb. 1833, 11 Sh. 389.

(x) *Monteath Douglas v. Douglas' Trs.*, 30 June 1859, 21 D. 1066.

(y) *Dennistoun v. Dalgleish*, 22 Nov. 1838, 1 D. 69.

(z) *Cowan v. Crawford*, 20 Jan. 1837, 15 Sh. 398. See *Campbell v. Campbell*, 1788, M. 4076, 6849.

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titled to make a limited provision for his widow out of the estate died abroad, in ignorance of the death of the previous heir, whereby the power had devolved upon him, the Court awarded to his widow a provision equal to that which he might have conferred upon her in virtue of the power.(a)

Whether appointment is voidable for excess.

1919. Where a power is violated or exceeded by giving a different estate from that which it authorises, *e.g.*, a life instead of a fee,(b) or by giving the estate to the wrong person,(c) the appointment will be set aside by the Court. Where a power was reserved by a husband in marriage-articles to grant provisions to daughters to the extent of £3000, and failing the husband exercising the power, to the wife, and the husband appointed to the extent of £2000, an additional bond granted by the wife to the extent of £1000 was held to be within the power.(d)

SECTION II.

POWERS CONFERRED BY DEEDS OF ENTAIL.

Limits of the subject.

1920. The present section is in a great measure supplementary to the chapter in which the subject of marriage-contract provisions is discussed. It is confined to the subject of the limitation of the powers of granting such provisions which is imposed by the nature of the title of an heir of entail in possession.(e)

Power of granter of entail to exclude terce, and effect of such exclusion.

1921. The statutory prohibitions directed against alienation, contracting debt, and altering the order of succession, though excluding by implication the power of granting provisions, do not derogate from the right of the widow to her terce, that being a provision which accrues to the widow by law, and is neither constituted by, nor dependent on the will of the heir in possession. Many entails, however, contain clauses excluding the right to terce, and such clauses of exclusion are held to be effectual as conditions of the grant.(f) Where the terce is not excluded, a provision, granted by

(a) *Campbell v. Campbell*, 25 Feb. 1809, F.C.

(b) *D. of Northumberland v. M'Gregor*, 28 Aug. 1846, 5 Bell, 396; *Baikie's Trs. v. Oxley*, 14 Feb. 1862, 24 D. 589.

(c) *Wight v. Wight*, 9 July 1818, Hume, 539; *Watson v. Marjoribanks*, 17 Feb. 1837, 15 Sh. 586.

(d) *Forbes v. Forbes*, 29 Jan. 1765, 2 Pat. 84. On the subject of excessive execution of powers, see Sugden on Powers, 8th ed. chapter 10. As to extension of powers in favour of grandchildren, see the next section of this chapter.

(e) The exercise of the powers conferred by the various entail statutes does not fall within our subject. In so far as provisions granted under such powers are made real burdens on the estate, and the estate is thus exposed to diligence at the instance of the creditor, the subject has been noticed incidentally in treating of the estate of an heir of entail (chapter 38, sect 2).

(f) *Gibson v. Reid*, 1795, M. 15,869; *MacGill v. Law*, 1798, M. 15,451; *Fairlie v. Fairlie*, 15 June 1819, F.C. See *Hay Newton v. Hay Newton*, 18 July 1867, 5 Macph. 1056.

the heir to his widow, in any form, and even on deathbed, is effectual to the extent of the terce.^(g) Where a jointure was granted by an heir of entail in possession in excess of the widow's legal provision, the Court found that the bond of annuity was comprehended in the prohibitory clause in the tailzie, but sustained the said bond in so far as the same could be supported by terce.^(h) In such cases, it has been observed, the Court will, in the exercise of its discretion, restrict the annuity to a moderate and suitable provision,⁽ⁱ⁾ the limit being the amount of the provision which the law gives to the widow of a fee-simple proprietor. Where an entail contained a prohibition to alter the order of succession, but no effectual prohibition against selling or contracting debt, a provision by way of annuity was sustained to the extent of the whole free annual proceeds of the estate.^(k)

1922. Where the deed of entail empowers the heirs in possession to grant provisions within certain limits, a provision granted in excess of the power conferred, will not be void, but will be restricted in accordance with the power.^(l) Where a power was given to grant liferent infeftments of such parts of the estate as should not exceed in yearly value a certain specified sum, and an heir in possession granted an infeftment in terms of the power, it was held that the widow was entitled to the benefit of a subsequent rise of rent in the lands in which she was infeft in virtue of the power.^(m) And, on the same principle of construction, an infeftment in locality lands of the value of half the rental of the estate, granted in terms of a power, was sustained, notwithstanding that at the death of the proprietor the estate had been diminished by a sale under the Act of Parliament authorising sales of entailed lands for the redemption of land tax.⁽ⁿ⁾ But where a power is given to provide annuities not exceeding a specified proportion of the rental, the amount of the annuity will depend upon the value of the rental at the death of the heir by whom it is granted, when the provision becomes exigible.^(o)

Effect of variances between the power conferred by the entail, and the deed of provision in exercise of it.

(g) Ersk. 8, 8, 80, 97; *Schaw v. Calderwood*, 1668, M. 8196; *Strachan v. Baldwin*, 1736, M. 8227; *Cant v. Borthwick*, 1726, M. 15,554.

(h) *Cant v. Borthwick*, *supra*.

(i) Sandford on Entails, p. 868, citing *Borthwick v. Borthwick*, 1730, M. 15,556, and *Noble v. Dewar*, 1758, M. 15,606.

(k) *Cuninghame v. Beaumont*, 1778, M. 15,526.

(l) *MacGill v. Law*, 1798, M. 15,451; *Bruce v. Carstairs*, 11 May 1773, 2 Pat. 329; *Earl of Rothes v. Rothes*, 29 Jan. 1829,

7 Sh. 389. See *Earl of Mar v. Erskine*, 28 Sept. 1831, 5 W. & S. 611, with reference to the construction of a power to burden the estate with provisions "such as the estate would conveniently bear and allow."

(m) *Agnew v. Agnew*, 12 Dec. 1810, reported in a note to the case of *Gordon v. Gordon*, 24 Jan. 1811 (16 F.C. 161).

(n) *Malcolm v. Malcolm*, 21 Nov. 1828, 2 Sh. 514, N. E. 453; and see *Earl of Kintore*, petr., 13 May 1814, F.C.

(o) *Graham v. Countess of Glencairn*, 7

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Construction of powers of granting annuities limited to a proportion of the free rental.

Mode of computation of amount of free rental.

1923. Where annuities are limited to a specified proportion of the rental, the computation is to be made with reference to the free rental, deducting real burdens, *(p)* but not personal debts which may be made to affect the estate. *(q)* And where, under the powers of an entail, provisions might be granted to wives and children not exceeding a specified proportion of rental "in so far as the same shall be free and unaffected at the time with prior liferents and annualrents of real debts, and after deduction of the annualrents of personal debts," it was held that, in estimating the amount of the annuity competent to be granted to the widow of an heir in possession, the interest of provisions to his children affecting the rents was not to be taken into computation. *(r)*

1924. In estimating the free rental, the land in the natural possession of the heir is to be included at a fair valuation; *(s)* but the rule does not extend so as to include the mansion-house, gardens, and policies. *(t)* After much discussion and some fluctuation of judicial opinion, *(u)* it is now settled that, in estimating the free yearly value of an entailed estate with reference to powers of granting provisions, the value of shootings must be taken into account, whether let or unlet, whether on highland or on lowland estates; and also the value of fishings; *(x)* the value being estimated, where the subject was in use to be let by the year, according to an average of the rents received during a series of years immediately preceding the death of the heir. *(y)* And where a locality had been granted without reference to shootings, it was held, in a question with the next heir, that the value of these subjects must be taken into computation for the purpose of ascertaining whether the locality did not exceed the provision authorised by the powers of the entail. *(z)*

July 1806, 5 Pat. 184; *Douglas v. Douglas*, 15 May 1822, 1 Sh. 408, N. E. 882. Also *Earl of Rothes v. Rothes*, 29 June 1829, 7 Sh. 889, where the same principle was applied to the limitation of the provisions competent to be granted to younger children.

(p) No deduction is allowed for property-tax; *MacLaine v. MacLaine*, 29 Nov. 1845, 8 D. 150; nor in respect of the statutory assessments for providing the minister's manse; *Elliot v. Elliot*, 17 Nov. 1818, F.C.; and for repairing churches and school-houses; *Anstruther v. Anstruther*, 14 May 1828, 2 Sh. 306, N. E. 269.

(q) *Lady Lee v. Lee*, 1698, M. 15,552; *Paterson v. Paterson*, 17 July 1849, 11 D. 1420.

(r) *Menzies v. Menzies*, 15 Dec. 1852, 15 D. 287.

(s) *Elliot v. Elliot*, 17 Nov. 1818, F.C.

(t) *Leith v. Leith*, 10 June 1862, 24 D. 1059.

(u) See *Sinclair v. Lord Duffus*, 24 Nov. 1842, 5 D. 174; *Macpherson v. Macpherson*, *infra*.

(x) *Leith v. Leith*, *supra*.

(y) *Macpherson v. Macpherson*, 16 Feb. 1848, 5 D. 651.

(z) *Menzies v. Menzies*, 10 March 1852, 14 D. 651. A right of patronage may be included in the valuation; *Duke of Roxburghe v. Roxburghe*, 25 June 1818, F.C.

The interest of money destined to the heirs of entail for the purpose of increasing the estate, must be considered as part of the annual value of the estate out of which provisions may be granted. (a) And, in determining upon the same principle of construction the value of the free rents or proceeds of entailed estates out of which provisions might be granted under the Aberdeen Act, it was ruled that such value included feu-duties, rents of estate forming part of the entail, but possessed on a personal title, and also the profits of coal mines, whether accruing in the shape of fixed rents or of royalties. (b)

1925. Where, however, a widow's provision consists of locality lands in which she is infeft, her life-interest is subject to the same limitations as that of an ordinary liferenter; and it would seem that she is not entitled to the profits of mines or quarries, even where these are in operation at the time the liferent right accrues. (c)

1926. The cases in which heirs of entail have been held liable to aliment the widows of predeceasing heirs, are for the most part referable either to the principle of passive representation on the part of the heir, or to that of liability for entailer's debts attaching to the estate. In those of the first class we cite *Campbell v. Campbell*, (d) where a widow of an heir of entail was found entitled to aliment from her son *ex debito naturali*, but not from the heir of entail succeeding to him, who did not represent her husband, and was not within the degree of relationship which creates such an obligation. (e) The rule that the aliment of an entailer's widow is a debt affecting the estate, is illustrated by the case of *Lowther v. Macclaine*. (f) In a more recent case, (g) where the entail authorised annuities to widows by way of locality, the Court awarded aliment to the widow of an heir who had died without exercising the power, but held that they could not grant aliment to the younger children.

1927. The construction of powers of granting provisions to

Provisions by way of locality, how construed.

Liability of an heir of entail in aliment to the widow of the predeceasing heir.

Principles applicable to the construction of powers of granting provisions to children.

(a) *Houston v. Nicolson*, 1756, M. 2338.

(b) *Wellwood v. Wellwood*, 12 July 1848, 10 D. 1480; and see, on the last-mentioned point, *Douglas v. Douglas*, 15 May 1822, 1 Sh. 408, N. E. 382.

(c) Sandford on Entails, p. 372, citing Ersk. 2, 9, 57; *Swinton v. Duchess of Roxburghe*, 1 Feb. 1814, F.C., where it was held that the widow of an heir of entail in locality lands was not entitled to work stone and lime quarries.

(d) *Campbell v. Campbell*, 25 Feb. 1809, F.C., and 16 Dec. 1818, F.C.

(e) See also *Adam v. Lauder*, 1762-4, M. 898, 400.

(f) *Lowther v. Macclaine*, 1786, M. 435. The case of *Gibson v. Reid*, 1796, M. 5891, illustrates a different principle. Here the entail was defective in the irritant clause, and the estate was therefore liable for the debts and obligations of the heir in possession, among which the right of his widow to aliment was comprehended.

(g) *Jackson v. Gourlay*, 24 Dec. 1836, 15 Sh. 813.

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younger children is based upon principles similar to those which have been considered; and the authorities bearing upon the one class of provisions are in many respects applicable to the other. Prior to the passing of the Aberdeen Act^(h) provisions could not be granted by heirs holding under strict entails to their younger children, except in so far as authorised by the deed of entail.⁽ⁱ⁾ Such provisions, however, might be made effectual against the estate as debts of the heir in possession, where an entail was defective in the prohibition against contracting debt.^(k) Where power to make such provisions was given, the estate was, and is under the existing law, to be considered as unentailed to the extent of the provisions authorised by the power; and provisions in excess of the power are to be restricted accordingly.^(l) Where the deed of entail does not provide for the apportionment of the provisions, the heir is entitled to divide the fund among his children as he pleases. A bond of provision in favour of younger children, existing at its date, was held to confer no right upon children afterwards born in the lifetime of the granter; but under reservation of the right of a posthumous child, as to which a favourable opinion was intimated from the bench.^(m)

Powers of granting provisions not to be extended by implication.

1928. Powers to grant provisions to children cannot, as a general rule, be extended by implication. Thus, where a substitute heir of entail nominated under the destination, but whose children were not substituted to him in the destination, executed a bond of provision in favour of his only son and daughter, bearing to be granted in pursuance of a power to heirs to grant bonds of provision to "their younger children other than the heir in the said lands," the bond was held to be invalid, on the ground that the power did not extend to the case of a substitute who had no child possessing the character of heir presumptive to the estate.^(o) But where an entail enabled the heir in possession to grant provisions in favour of the children of an "eldest son," and the destination called the second son to succeed in a certain event (which happened), it was held that a provision in favour of the children of that second son was a valid exercise of the power.^(p) So also, a power to grant

(h) 5 Geo. IV., cap. 87.

(i) Ersk. 3, 8, 80: "The granting of provisions to younger children, even when moderate ones, suitable to the condition of the granter, has been adjudged a contravention upon this medium, that the providing of these is to be accounted the voluntary deed of the granter, seeing younger children are not secured in any

legal provision out of the father's estate as widows are out of that of the husband."

(k) *Lockhart v. Lockhart*, 1761, M. 12,845.

(l) *MacGill v. Law*, 1798, M. 15,451.

(m) *Oliphant v. Oliphant*, 1798, M. 6608.

(o) *Dickson v. Dickson*, 4 July 1851, 13 D. 1291; 8 Feb. 1852, 14 D. 432; 13 June 1854, 1 Macq. 729.

(p) *Erskine*, 2 Feb. 1850, 12 D. 649.

provisions to "daughters and heirs-female" may be exercised in favour of daughters who are not heirs presumptive at its execution.^(q) CHAPTER LXI.

1929. Notwithstanding the recognition in other cases of the rule, that powers of burdening are subject to a strict construction, the Court has, by an equitable extension of the *conditio si sine liberis*, sustained bonds of provision granted in favour of grandchildren, being the representatives of deceased children of the heir in possession. Such bonds were held to be within the powers of the heir, where the deed of entail allowed certain portions of the rents "to be employed, laid out, and secured, to be a fund for provisions to younger children of the heirs, or of others of my heirs of tailzie aforesaid, where younger children are not at all, or are not sufficiently provided, or may afterwards happen to exist."^(r) The same construction was admitted in another case, where the deed of entail empowered the heirs in possession to burden the estate to a specified extent, "for providing of daughters and younger children."^(s)

In what cases a power of providing younger children may be exercised in favour of grandchildren.

1930. It is doubtful whether a general power of this nature can validly be exercised in favour of a grandchild of the heir in possession in the lifetime of the father. In the case of *Strathallan*,^(t) an heir in possession had, in the assumed exercise of a power to burden with provisions, created a trust for payment to his son of the annual rent accruing on the capital of the provision for a term of years, and thereafter for investment of the principal in the purchase of lands to be entailed on his said son and his heirs in a certain order. This was held to be invalid, except to the extent of the annual rents provided to the son during his life. But in the case of *Maxwell v. Grierson*,^(u) where an heir in possession, for the purpose of implement of an obligation undertaken in his daughter's marriage-contract, granted a bond of provision in the exercise of the powers of the Aberdeen Act, under the declaration that it should be taken in satisfaction of the purposes of that contract (which gave an interest to the issue of the marriage), it was held that the bond was not ineffectual, as being in favour of parties not contemplated by the Statute. The principle of this case would ap-

Whether grandchild, whose father is living, is a proper object of a provision under such a power.

^(q) *Redhouse, Crs. of v. Glass*, 1748, M. 2806 (*Watson v. Glass*); Elch. "Provisions to Heirs," No. 7; 5 Dec. 1744, 1 Cr. St. & Pat. 872.

^(r) *Earl of Wemyss v. Trail*, 28 Nov. 1810, F.C.

^(s) *Smollet v. Smollet*, reported in a note to the preceding case, 16 F.C. 48.

^(t) *Viscountess of Strathallan v. Duke of Northumberland*, 2 D. 840; 28 Aug. 1846, 5 Bell, 896 (*nom. Northumberland v. Macgregor*). A power to settle estate on a younger child cannot be exercised in favour of a grandchild; *Cunynghame v. Cunynghame*, 1777, 2 Pat. 484.

^(u) *Maxwell v. Grierson*, 12 Dec. 1843, 6 D. 203.

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Doctrine of the
law of England.

pear to be equally applicable to provisions granted in pursuance of powers conferred by the deed of entail.

1931. It appears to be settled in the law of England that a power to appoint in favour of children will not authorise an appointment to grandchildren.^(x) In the case of *Doe d. Duke of Devonshire v. Cavendish*,^(y) a contrary opinion was in effect pronounced; but in the subsequent case of *Brudenell v. Elwes*,^(z) now a leading authority, it was decided that a limitation in a marriage-settlement to the use of the children "in such parts or proportions, and for such estate and estates, and with and under such charges, provisions, conditions, and limitations," as the spouses should appoint, was not an authority to give a share to grandchildren. But where, under a power to appoint to children, the father appointed to them absolutely, and then declared that the share of each of his daughters in the fund appointed was so appointed, and he thereby, *as far as he lawfully or equitably might or could*, ordered and appointed that the same should be held by his trustees for the daughter's separate inalienable use during life, and after her decease, for her children as she should appoint, etc., it was held that the words of appointment were sufficient to vest the shares absolutely in the daughters; that the attempt to restrict their right by limitations to their issue was inoperative; but that it was competent to the donee of the power to settle the daughters' shares to their separate use, and to restrain them from anticipation or alienation.^(a) A power of appointing or granting provisions to heirs of the body, or issue, may, according to the English authorities, and in principle, be exercised in favour of descendants *in esse* of any degree, unless the construction is affected by the element of special intention.^(b)

Deed of provision not invalidated by reason of non-recital or mis-recital of the power.

1932. Where an heir in possession is empowered by the deed of entail to burden the estate with provisions, the non-recital or mis-recital of the power, or the recital of the Aberdeen Act and the professed exercise of the statutory power, will not prevent a deed of provision within the prescribed limits being sustained as a valid exercise of the power given by the entail.^(c) Where a power was reserved by a deed of entail, "to burden and affect the said lands and estate" with provisions in favour of younger children, a bond granted in implement of this power was sustained, although

(x) See the cases cited by Lord St Leonards (Powers, ch. 16, sec. 1, § 2-9).

(y) *Doe d. Duke of Devonshire v. Cavendish*, 4 Term Rep. 741, 744.

(z) *Brudenell v. Elwes*, 1 East, 442; 7 Ves. 882.

(a) *Carver v. Bowles*, 2 Russ. & Myl. 801.

(b) Sugden on Powers, chapter 6, section 1, § 8-6.

(c) *Crawford v. Hotchkis*, 11 March 1809, F.C.; *Lockhart v. Lockhart*, 15 July 1853 15 D. 914.

it bound not the estate, but the heirs of entail.(d) In another case, it was held competent, in the exercise of a similar power, to grant a bond burdening the heirs of entail only in the event of the failure of the granter's own issue male.(e) And where a power is given in express terms to burden the entailed estate, the granter is not entitled to relieve that estate by requiring that the provisions shall be paid out of the rents falling to the next heir in possession.(f)

1933. In regard to the estimation of the free annual rental or value of the estate, where provisions to children are restricted to a certain number of years' rent, the authorities cited with reference to widows' annuities appear to be applicable. Whether an annuity to the widow of the heir by whom the provision is made falls to be deducted in estimating the free rental, is a question depending on the precise terms of the power, the presumption being that the annuity is to be regarded as a burden.(g)

1934. Where a power of sale is given by the deed of entail for the purpose of paying off provisions charged upon the entailed estate, it is usually exercised under the authority of the Court of Session, who, upon a petition to that effect, authorise a sale of such parts of the estate as may be suitable, and appoint a trustee to carry the sale into effect, and to apply the purchase money. In such proceedings, the holder of the bond of provision is considered as a creditor of the entailer.(h)

1935. Powers of burdening entailed estates with provisions are, according to the usual tenor of such clauses, granted in general terms to the heirs and members of tailzie; and, on a strict construction of clauses so framed, it would appear that the power could not be exercised except by an heir in possession. Provisions granted by heirs expectant are, however, allowed to have operation in the event of the granter afterwards succeeding to the estate, and are binding both against the person and the estate.(i) In virtue of the Statute 1695, cap. 24, provisions granted by heirs-apparent who have been three years in possession are held to be binding against

(d) *Cleghorn v. Elliot*, 18 Jan. 1833, 11 Sh. 259.

(e) *Howden v. Porterfield*, 17 June 1834, 12 Sh. 734.

(f) *Viscountess Strathallan v. Duke of Northumberland*, 20 May 1840, 2 D. 840.

(g) *Macdonald v. Lockhart*, 18 May 1836, 14 Sh. 785, overruling *Douglas v. Douglas*, 15 May 1822, 1 Sh. 408, N. E. 382; but

see *Paterson v. Paterson*, 17 July 1849, 11 D. 1420.

(h) See *Howden v. Porterfield*, 17 June 1834, 12 Sh. 734.

(i) *Houston v. Nicolson*, 1756, M. 2338. In this case the provision was granted by or with the consent of the heir in possession at the time; but that element does not appear to be material to the question.

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the estate, (k) whether constituted by bond or by revocable deed of settlement. (l)

Deeds of expectant heir in effect contingent on his succession to the estate.

1936. From a consideration of the nature of such powers, it is evident that the efficacy of a bond of provision granted by the heir-expectant, in the ostensible exercise of the powers conferred by the deed of entail, depends upon the contingency of his surviving and succeeding to the estate. Unless he succeeds he is not an heir of entail in the sense of the power under which the provision is granted. This obstacle to the constitution of an effectual security over the entailed estate in favour of the widow or children of an expectant heir, may be removed by the heir in possession propelling the estate to him under reservation of a liferent, a device which has sometimes been resorted to by female heirs of entail in favour of the eldest son. Thus, in the case of *Halkett Craigie v. Craigie*, (m) Mrs Craigie, the heir in possession under a deed of strict entail, which authorised the heirs in possession to charge the estate with provisions to a certain extent, conveyed the estate to her eldest son, reserving not only her liferent "but also full power, without the advice or consent of her said son, or the heirs of tailzie substituted to him, to exercise every right whatsoever respecting the said lands and estates in so far as not restricted by any of the former settlements thereof." In virtue of this reservation, Mrs Craigie granted provisions to her younger children; while her son, being vested with the fee of the estate, also exercised similar powers in favour of his wife and younger children by a postnuptial contract of marriage. The son to whom the succession was propelled predeceased his mother, and in these circumstances a majority of the judges decided in favour of the validity of the provisions granted by both the liferenter and the fiar.

Halkett Craigie v. Craigie.

Maintenance of heir in certain cases provided for by authority of the Court.

1937. In some cases the Court has thought it fitting to authorise money to be borrowed by the tutors or curators of an expectant heir of entail, for the purposes of education and maintenance. This is an act of administration not within the common law powers of the tutors or curators of a minor, and the authority of the Court is requisite in order that the transaction may be binding upon the expectant heir after he succeeds to the estate. (n)

(k) *Kennedy v. Kennedy*, 11 Feb. 1829, 7 Sh. 397.

(l) *Russel v. Russel*, 7 Dec. 1852, 15 D. 192.

(m) *Halkett Craigie v. Craigie*, 4 Dec. 1817, F.C.

(n) *Miller*, 26 Nov. 1836, 15 Sh. 147; *Earl of Buchan*, 16 Dec. 1837, 16 Sh. 288;

Jackson v. Gourlay, 24 Dec. 1836, 15 Sh. 818.

CHAPTER LXII.

OF POWERS OF DIVISION.

1938. When a sum of money is settled upon minor children, it is not unusual to confer upon the surviving parent a discretionary power of apportioning the bequest among the several members of the family, according to their necessities or deserts. A similar power may be reserved by the granter of a marriage-contract provision, where the purpose is to secure a fixed sum to the family, without interfering with the father's discretion as regards the distribution of the money. One main object in view in the settlement of provisions by antenuptial contract, is that of conferring a *jus crediti* on the children of the marriage,—an object which can only be attained by the husband or some other responsible party coming under an obligation to pay a fixed sum at a period which may happen during his lifetime, *e.g.*, at the dissolution of the marriage. If the husband is desirous at the same time of retaining his power of testing upon the fund so appropriated, he may, to a certain extent, accomplish that purpose by reserving to himself a power of division. The cases of *Browning v. Browning's Trustees* (a) and *Goddard v. Stewart* (b) show the importance of attending, in the framing of settlements, to the conditions which can alone secure a *jus crediti*, namely, an absolute obligation to pay, that obligation being prestable at a period which may happen in the husband's lifetime.

Purpose contemplated by conveyance, subject to a power of division.

1939. A provision in favour of children, contained in a marriage-contract, is onerous; and, notwithstanding the reservation of a power of distribution, it vests in the children as a class from the time at which such provision is made payable or made chargeable with interest. In the case of *Sivright v. Dallas*, (c) where a fund was secured by postnuptial contract to the parents in liferent, and to the

Doctrine that provisions given subject to a power of disposal, vest in the children as a class.

(a) *Browning v. Browning's Trs.*, 25 May 1887, 15 Sh. 999.

6 D. 1018, see Lord Moncreiff's opinion; *Miller v. Miller*, *infra*.

(b) *Goddard v. Stewart*, 9 March 1844,

(c) *Sivright v. Dallas*, 27 Jan. 1824, 2 Sh. 648, N. E. 548.

CHAPTER LXII. children *nascituri* in fee, the Court seem to have been of opinion that a contingent fee vested in each child at birth, defeasible by the appointer to a certain extent during his lifetime; and this appears to us to be the more correct view. And accordingly, although the father had executed a deed of apportionment giving the bulk of the money to his daughter, and she died, bequeathing her interest to her uncle, the Court sustained a revocation of the appointment executed after the daughter's death, and held that the presumption was for an equal division. A liferent given by a stranger to a father in conjunction with a power of apportionment among his children, does not import a fee in the person of the father. This proposition may be deduced from the general doctrine of liferents with powers of appointment superadded, as explained in a previous chapter; and it was expressly laid down in the case of *Miller v. Miller*.(d)

Powers of division given to trustees.

1940. A power of division is sometimes given to trustees, which may relate either to the appointment of family provisions or to the selection of objects of charity or benevolence. Where a power is given to trustees of settling marriage portions, or advancing sums for the establishment of children in business, it is usual to specify a maximum sum, which thus furnishes a rule of limitation for the appointment. But in a case where the sum had been left blank,(e) the Court authorised the trustees to fill up the blank with such a sum as was just and reasonable, according to their sound discretion. In the case of *Muir v. Macdonald's Trustees*,(f) a father bound his trustees, on his daughter attaining majority, or on her previous marriage, to lay out the sum of £1500 on heritable bonds, or other proper security; but the trustees failed to invest the money when the beneficiary became of age, and the lady afterwards married. In an action, to which the surviving trustee was a party, the Court found that the power had not lapsed by non-exercise at the period appointed by the settlor; and that it was the duty of the surviving trustee to execute the power.

Whether such powers lapse by non-exercise at the specified time.

Whole fund must be divided.

1941. The whole fund must be divided amongst all the grantees of the settlement; and if this is done, the Court will not interfere with the appointment on the allegation, that certain of the shares are inadequate, unless the sum given is so small as to be illusory.(g) It is settled by two concurring decisions of the Court that the absolute exclusion of any one child, or of the representatives of any

Whether an elusory appointment is objectionable on that ground.

(d) *Miller v. Miller*, 14 Nov. 1838, 12 Sh. 81; and see also *Ormiston v. Ormiston*, 24 Jan, 1809, Hume, 531.

(e) *Stewart v. Stewart*, 26 Nov. 1818, F.C.

(f) *Muir v. Pollock*, 9 Dec. 1851, 14 D. 152.

(g) *Dunbar's Trs. v. Shaw*, 18 Nov. 1805, Hume, 265; *Wight v. Wight*, and *Watson v. Robertson*, *infra*.

child in whom a *jus quæsitum* has vested, nullifies the appointment.^(h) But it has not been authoritatively determined whether it is a good objection to a deed of appointment that the division is made so as to give only a nominal or illusory share to some of the legatees. This was formerly held to be a good objection by the Court of Chancery in England. The Court was in the habit of setting aside unequal appointments, as being contrary to equity,—a system which gave rise to much litigation, and ultimately became unworkable. To correct this error, the Act 1 Will. IV., cap. 46, was passed, which declared that appointments should be valid and effectual “notwithstanding that any one or more of the objects should not thereunder, or in default of such appointment, take more than an unsubstantial, illusory, or nominal share of the property subjected to such power.”⁽ⁱ⁾ The tendency of the law of Scotland on the subject is not very well defined. In the case of *Watson v. Marjoribanks*,^(k) a deed of apportionment was set aside, partly on the ground that the shares given to two of the legatees were illusory. The authorities on the question were afterwards reviewed in the case of *Crawcour v. Graham*,^(l) by Lord Cuninghame, who came to the conclusion, that it was neither competent nor expedient to interfere with the exercise of a power of apportionment on such grounds. In the subsequent case of *Marder’s Trs. v. Marder*,^(m) a deed of apportionment of a provision of £2000—whereby £50 was given to one, and the balance to the other of two daughters—was held not to be open to the objection of illusory appointment.

1942. Another question has been much agitated, which is, Who are the parties entitled to challenge an irregular appointment? In the case of *Watson v. Marjoribanks*,⁽ⁿ⁾ a deed of apportionment was set aside at the instance of certain of the children, on the ground that two other children, then deceased, and who were not represented in the process, had been passed over. It was observed by the Lord Ordinary, and assumed in the judgment of the Court, that any of the children would have a legal interest to set aside an irregular appointment, although he himself were not excluded; his title being his position as a beneficiary under the settlement creating the power. In the case of *Crawcour* the action was at the instance of the creditors of the excluded legatees. The whole Court were

Who is entitled to challenge a defective appointment.

(h) Ersk. 3, 8, 49; *Wight v. Wight*, 9 July 1818, Hume, 539; *Watson v. Robertson and Marjoribanks*, 17 Feb. 1837, 15 Sh. 586.

(i) 11 Geo. IV. and 1 Will. IV., cap. 46.

(k) *Watson v. Marjoribanks*, 17 Feb. 1837, 15 Sh. 586.

(l) *Crawcour v. Graham*, 8 Feb. 1844, 6 D. 589.

(m) *Marder’s Trs. v. Marder*, 30 March 1853, 15 D. 638.

(n) *Watson v. Marjoribanks*, *supra*.

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consulted on the question of title, and their opinion was (Lords Fullerton and Jeffrey alone dissenting) that the right of challenge was personal to the object of the power, and that it could not be put in motion by his creditors. Lord Justice-Clerk Hope pointed out that the very object of reserving a power of distribution might be to prevent the parent's money going to the creditors of a son who was hopelessly involved in debt, adding,—“That the actual interest of the child, at the date of the deed exercising the power of distribution, is within the duty of the parent to consider and provide for, can hardly be disputed. If that interest is provided for in the way most beneficial to the child, and the child adopts and concurs in the exercise of the power, there is an end of the question.”(o)

Fund settled on children of a marriage, whether subject to an implied power of division.

1943. It seems to be established by some of the older cases on marriage-contract provisions, that a fund specially destined to heirs or children of the marriage is subject to an equitable power of division, (p) which is, of course, not validly exercised by conveying to the heir-at-law. (q) In the more recent case of *Ponton v. Ponton*, (r) the Court, adhering to Lord Jeffrey's interlocutor, sustained a deed of apportionment of a sum secured by antenuptial contract to the surviving spouse in liferent, “and to the heirs and bairns of the said intended marriage in fee;” but we doubt whether this decision would now be regarded as a precedent. In *Dykes v. Dykes*, (s) the expression, “heir or heirs” of the marriage, in a contract of marriage binding the husband to convey heritable estate, was interpreted to mean the heir-at-law; and a conveyance of part of the estate to a younger son was held to be *ultra vires*, and a fraud upon the heir. But a power to divide the price of a wife's estate among the “heirs and bairns of the marriage” was found to be validly exercised by entailing the estate on the eldest son, and charging it with bonds of provision in favour of the younger children. (t)

Whether children of second marriage have a right to participate.

1944. On the subject of apportionment between children of a first and second marriage, two cases are reported, which sufficiently exhibit the principles by which the Court will be guided in the determination of such questions. In the first of these cases, the husband had bound himself to pay to the children in existence at the dissolution of his first marriage £9000, divisible at his pleasure, or the sum of £6000, if there should be only one surviving. The wife died, leaving two children; and the husband,—having entered into

(o) *Crawcour v. Graham*, 6 D. 596.

(r) *Ponton v. Ponton*, 14 Feb. 1837, 15

(p) *Herries v. Herries*, 26 Nov. 1806, Hume, 528. See the prior cases cited in 1 Fraser, 768.

Sh. 554.

(s) *Dykes v. Dykes*, 9 Feb. 1811, F.C.

(q) *Ormiston v. Ormiston*, 24 Jan. 1809, Hume, 531.

(t) *Erskine v. Erskine*, 17 Jan. 1826, 4

Sh. 357, N. E. 362.

a second marriage, and after the death of one of these children, a son,—indorsed on the contract a memorandum apportioning £3500 as the share of the surviving child, but making no mention of her deceased brother: the Court refused to sustain the appointment, and found that the surviving child had right to the whole £6000, one-half in her own right, and one-half as executrix of her brother.(u) The question in the other case alluded to, related to the extent of a power of apportionment granted to a lady over a sum of money left by her uncle “for the benefit of her children.” The lady, after she became a widow, executed a deed of apportionment, disposing of the whole property to the children of her late husband, but reserving a power of alteration in the event of a second marriage. The Court refused, in a declarator, to sustain this deed as a valid apportionment, holding that its validity would depend on whether the reserved power was or was not executed. A new deed was then executed, setting apart a sum for the children of any future marriage, with a destination over to her eldest son. A new action of declarator having been brought, the deed was sustained.(x)

1945. It is immaterial in what form a power of apportionment is exercised. Thus, if the terms of the power are complied with, the appointment may either be by deed of appointment, as in *Hunter v. Eccles*,(y) or as part of a marriage-contract, or by bond of provision,(z) or by a will or testamentary disposition in which the fund may have been dealt with as the appointer’s own property.(a) The apportionment may be made by appropriating a specific fund to one of the children, and allotting the residue to others; and if the fund so appropriated be irrecoverable, the residue will not be chargeable with the loss sustained by the special appointee.(b) But where a father, who had conveyed his estates by antenuptial contract to the children of the marriage, subject to a power of division, afterwards acquired by purchase certain heritable property, taking the titles to himself, his heirs and assignees, it was held that the taking the title to the acquired property in these terms was not an exercise of the power of division in favour of his eldest son and heir; and the estate was declared to be subject to equal division, along with the rest of the settlor’s property.

Form and manner of appointment in the exercise of a power of division.

Appointment by way of fixed legacies and residue.

(u) *Brodie’s Trs. v. Mowbray’s Trs.*, 12 Nov. 1840, 3 D. 81.

(y) *Hunter v. Eccles’ Trs.*, 17 July 1856, 18 D. 1384.

(x) *Hunter v. Eccles’ Trs.*, 7 March and 17 July 1856, 18 D. 778, 1303. See *Guthrie v. Bell*, 21 Nov. 1846, 9 D. 124, as to power to provide for wife in event of second marriage; and cases on Powers of Disposal, *antea*, chapter 60.

(z) *Erskine v. Erskine*, 17 Jan. 1826, 4 Sh. 357, N. E. 362.

(a) *Milne v. Milne*, 6 June 1826, 4 Sh. 679, N. E. 685. And see *Jardine v. Jardine*, 22 Jan. 1850, 12 D. 504.

(b) *Waddell v. Waddell*, 20 July and 15 Dec. 1842, 5 D. 309.

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Appointment by giving a liferent to one person, and a fee to another.

1946. In the case of *Baikie's Trs. v. Oxley*, (c) the question was raised, whether the donee of a power of division among children is entitled to create a life interest out of the fund. The fund was £2000; and the donee had executed a deed of appointment, by which she gave to one of her children £5 down, and the liferent of £1000; and to the other, £995, and the reversion of £1000 on the expiry of his sister's liferent. A majority of the judges of the First Division, concurring in opinion with Lord Jerviswoode, held that the deed of appointment was *ultra vires*. Lord President M'Neill rested the judgment on the ground that the direction in the bond of provision, which contained the power, was to hold a capital sum for behoof of the donee in liferent and her children in fee, subject to the power of division; and that, as the share of one daughter had been given chiefly in the shape of a liferent, the power had been exceeded. Lord Deas dissented, on the ground, as we understand, that the £5 actually given to Mrs Oxley would have stood as a good appointment in itself, and that the addition of a liferent of £1000 was not a matter of which she was entitled to complain. It appears to us that this reason would equally apply to the case of an appointment to strangers, if only £5 a-piece had been given to the legatees. The answer is, that every legatee is entitled to insist that the *whole fund* should be distributed; and he may fairly enough presume that if a larger share were at the trustees' disposal for immediate distribution, his own share of the fee would be increased. A simple provision of a sum of money to a child will not be presumed to be made in the exercise of a power of distributing a specific fund or estate. (d)

Power to divide or distribute a fund amongst relations.

1947. By the law of England, a bequest for distribution among the testator's "relations" is divisible, exclusively, among the heirs who would be entitled to succeed under the statute of distributions, that is, amongst the nearest of kin according to the local law of succession. (e) The tendency of the older Scotch cases was towards a more liberal construction; (f) and this view of the law receives a certain degree of confirmation from the decision of Lords Cranworth

(c) *Baikie's Trs. v. Oxley*, 14 Feb. 1862, 24 D. 589. As to whether a power of appointment can be exercised by limiting a liferent, see § 1908, *supra*.

(d) *Greenock Banking Co. v. Smith*, 17 July 1844, 6 D. 1840.

(e) Sugd. Powers, 8th ed., chapter 15; 2 Jarman on Wills, 8d ed., 108. The rule is the same where the bequest is to "poor relations;" Lewin on Trusts, 5th ed., p. 595.

(f) *Brown's Trs. v. His Relations*, 1762, M. 2818; *Wharrie v. Wharrie's Relations*, 1760, M. 6599; *Murray v. Fleming*, 1729, M. 4075; *Dick v. Ferguson*, 1758, M. 7446; *Snodgrass v. Buchanan*, 1806, M. "Service of Heirs," App. No. 1; and see Lord Gifford's observations in *Hill v. Burns*, 14 April 1826, 2 W. & S. 87; also *Crichton v. Grierson*, 25 July 1828, 3 W. & S. 329.

and St Leonards in *Scott v. Scott*,(g) holding that a bequest of residue to "nearest relations" would, according to the testator's intention, include the children of his half-sister. But in the subsequent case of *M'Cormack v. Barber*(h) the point was considered still open; and Lord Colonsay was of opinion, that, in the absence of expressions indicative of a different intention, the word "relations" meant nearest relations or next of kin.(i) But it was ruled by the majority of the Court, that where a discretionary power was given, the trustees were entitled to distribute (by selection) amongst all who could show a traceable and distinct relationship to the testator; though, in the exercise of the power, the trustees had allotted but a small fraction of the estate to the next of kin.(j) According to the opinion of Lord Curriehill,(k) a bequest to "relations," unaccompanied by a power of selection, might be void for uncertainty; but this view is at variance with the decision in *Scott v. Scott*; and the better opinion seems to be, that the principle enunciated by the Lord President, of equal division amongst the next of kin, would apply to a legacy unaccompanied by a power of distribution.

1948. A direction to trustees to lay out trust-money on charities generally,(l) or to establish a permanent trust for the benefit of the truster's descendants,(m) is not void for uncertainty, for under such a provision a power is implied of selecting objects of the class designated by the truster. But it has been considered that the Court of Session will not exercise a discretionary power,(n) the case of charitable trusts being the only exception.(o) It is not quite clear that a power of division appointed to be executed on the occurrence of a particular event, such as majority or marriage, can be enforced after a considerable time has elapsed beyond the stipulated period.(p) In default of an effectual division under a power of this nature, whether by reason of the failure to exercise, or of

Power to divide amongst objects of charity, etc.

Where power has not been exercised, the division will be equal.

(g) *Scott v. Scott*, 10 May, 1855, 2 Macq. 281, affirming 14 D. 1057.

(h) *M'Cormack v. Barber*, 25 Jan. 1861, 23 D. 398.

(i) 23 D. 411.

(j) See 23 D. 409, *per* Lord Deas.

(k) 23 D. 406. On the general subjects of Bequests to Relations, reference is made to chapter 41, *in fin*.

(l) *Dundas v. Dundas*, 27 Jan. 1837, 15 Sh. 427; and see chapter 24 (Charitable Bequests).

(m) *M'Nair v. M'Nair*, 1791, M. 16,210; *Cairnie v. Cairnie's Trs.*, 14 Nov. 1837, 16 Sh. 1.

(n) *Burnsides v. Smith*, 10 June 1829, 7 Sh. 735; *Ireland v. Glass*, 18 May 1838, 11 Sh. 626; *Macdonald's Trs. v. Macdonald*, 14 Feb. 1842, 4 D. 678; *Nisbet v. Tod*, 15 Jan. 1848, 10 D. 361; *Muir v. Pollock*, 9 Dec. 1851, 14 D. 152; *Campbell v. Campbell*, 1738, M. 4076, 6849.

(o) *Miller v. Black's Trs.*, 14 Sh. 555; 14 July 1837, 2 S. & M'L. 866. See opinions in *Kelland v. Douglas*, 28 Nov. 1863, 2 Macph. 150.

(p) See *Stein v. Stein*, 8 Dec. 1826, 5 Sh. 101, N. E. 93; *Cowan v. Crawford*, 20 Jan. 1837, 15 Sh. 398; *Muir v. Pollock*, *supra*.

CHAPTER LXII. the irregular exercise of the power, the estate will fall to be divided amongst the beneficiaries in equal shares. (q)

(q) *Sivright v. Dallas*, 27 June 1824, 2 Sh. 648, N. E. 548; *Watson v. Marjoribanks*, 15 Sh. 586, 591; *Jardine v. Jardine*, 22 Jan. 1850, 12 D. 504; and cases in the preceding note; also *Thomson v. Cumberland*, 16 Nov. 1814, F.C.; *More v. Grier*, 1698, M. 14,720. As to the period when a division ought to be made, see *Dunbar's Trs. v. Shaw*, 18 Nov. 1805, Hume, 265; *M'Cormack v. Barber*, 25 Jan. 1861, 23 D. 398.

PART IX.

ADMINISTRATION OF TRUST AND
EXECUTRY ESTATES.

CHAPTER LXIII.

ADMINISTRATION OF TRUSTS OF PERSONAL AND
GENERAL ESTATES.

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|---|--|
| I. <i>Realisation and Management of Estate.</i> | III. <i>Payment of Debts and Legacies.</i> |
| II. <i>Of the Safe Custody of the Estate.</i> | IV. <i>Of Investments.</i> |

SECTION I.

REALISATION AND MANAGEMENT OF THE ESTATE.

1949. When we speak of *realisation*, personal estate alone is understood to be in view. The sale of heritable estate is a special trust, and will be separately considered. (a) Before the trustee can proceed to realise, he must qualify a title; and, in the case of testamentary settlements, the most usual title of intromission is that of confirmation as executor.

Realisation of
the estate.

1950. The trustee's right to confirmation is constituted by acceptance of the trusteeship, which, in the general case, carries with it the duties and responsibilities of executorship. Having once declared his acceptance of the office, the executor ought to lose no time in having his right confirmed; because, without the title conferred by confirmation, he is neither in a position to insist for the recovery of debts due to the estate, nor to accept a discharge for its

Confirmation
requisite to give
testamentary
trustee an active
title.

(a) See chapter 64.

CHAPTER LXIII. liabilities. (b) For example, it has been held that an executor or administrator suing for recovery of a trust-debt must produce his title upon demand; the refusal to make production being a ground for a sist of process. (c) The question of the sufficiency of the inventory given up on confirmation, is not one with which the debtor is concerned; the extract decree of confirmation being a sufficient title to sue for all debts included in the inventory. (d) Should the amount ultimately realised exceed the estimated value of the debt as per inventory, it will be the duty of the trustee to give up an additional inventory, paying stamp-duty on the difference.

What titles of possession are equivalent to confirmation.

1951. By the Statute 1690, cap. 26, special assignments and dispositions in favour of representatives are declared to constitute a good and valid title of possession, "albeit the sums of money or goods therein contained be not confirmed." On the construction of this Statute it has been held, that a conveyance in general terms of a share of the capital stock in the business of a firm, (e) as also a bequest of all debts and sums of money due to the testator by one individual, (f) were special assignments. If, therefore, the executor can obtain possession of debts specially conveyed without resorting to diligence, his title is secure without confirmation; (g) but he would not be safe, in the prospect of a litigation, to trust to the security of the assignment; because the Act saves the diligence of creditors, and consequently, as Lord Glenlee observed, if diligence were done before possession or intimation, the subject would be carried to the creditor. (h) The execution of a bond of corroboration in favour of the executor, (i) the payment of interest, (k) or the acceptance of an intimation of assignment, (l) have been considered effectual, on the principle of constructive delivery, to vest the property in the executor; but it may be doubted whether constructive possession would be sufficient to exclude the interest of creditors using diligence in funds not the subject of a special assignment.

Whether probate or letters of administration constitute an active title.

1952. Prior to the passing of the Confirmation and Probate Act, 1858, it was settled that probate or letters of administration

(b) See 21 & 22 Vict., cap. 56, as to Confirmation of Executors, and grants of Probate and Administration. An executor who has stated a debt at its full amount, but valued it at less in the inventory lodged with the Stamp Office, and paid stamp-duty on the lower amount, is entitled to sue for, and on obtaining decree, to charge for the entire sum; *Brown v. Miller's Exrs.*, 16 Dec. 1858, 16 D. 225.

(c) *Horne & Rose v. Ram*, 28 Nov. 1848, 11 D. 141.

(d) *Broun v. Moffat*, 16 Dec. 1858, 16 D. 225.

(e) *Bell v. Willison*, 13 Jan. 1881, 9 Sh. 266.

(f) *Lyle v. Falconer*, 2 Dec. 1842, 5 D. 236.

(g) *Dobie v. Oliphant*, 1707, M. 14,390.

(h) *Bell v. Willison*, 9 Sh. 267.

(i) *Watson v. Marshall*, 1782, M. 7009.

(k) *Robertson v. Gilchrist*, 25 Jan. 1828, 6 Sh. 446.

(l) Shaw's Bell's Com. 657.

were equivalent to a license to sue in the Scotch Courts ; the debtor, however, being entitled to insist on confirmation before extract. *(m)* Under the present law, *(n)* an executor founding on an English title would only require to obtain an indorsation of the probate or letters of administration from the Commissary Court of Scotland. In like manner, the title of a Scotch trustee suing in England or Ireland must be perfected by registration of the extract of confirmation in the Court of Probate. *(o)*

1953. In the discharge of his duty to the truster, it may be necessary for an executor not only to resist proceedings for the reduction of the conveyance in his favour, but also to take action against vitious intromitters, and parties claiming possession of the estate in virtue of competing titles ; *(p)* and in the event of a competition as to the possession of a fund situated in Scotland, the question of possessory title will be determined by the *lex loci rei sitæ*. *(q)* Executors claiming right to a personal bond as part of the moveable estate of the deceased, have been found entitled to reduce a bond of corroboration—which had been granted by inadvertence to the heir-at-law—after a lapse of nearly forty years from the date of the bond of corroboration. *(r)* It will also be the duty of executors succeeding to a subsisting executry trust, not wound up, to take all proper measures for calling the former executors or representatives to account ; and they will not be entitled to exoneration, as a matter of course, on accounting for the funds to which they have confirmed, should the beneficiaries insist on an investigation of the previous management. *(s)* The Court will not award sequestration of the estates of a deceased debtor, or appoint a factor under the Bankruptcy Act, if his executors are willing to administer. *(t)*

Reduction of competing titles, accounting, etc.

1954. It is the duty of a trustee, as soon as he has qualified himself by confirmation, to take active measures for realising the truster's assets and property. Executors, however, are not bound to engage in fruitless litigation ; and in an action against executors, for neglecting to take proceedings upon a bill of exchange of which

Recovery of assets : trustees have a discretion as to bad debts.

(m) *Clerk v. Brebner*, 1759, M. 4471 ; *Wardlaw v. Maxwell*, 1715, M. 4500 ; *Fraser v. Johnston's Trs.*, 11 July 1821, 1 Sh. 122 ; *Stewart v. Macdonald*, 21 Nov. 1826, 5 Sh. 29, N. E. 27.

(n) 21 & 22 Vict., cap. 56, §§ 9 & 15.

(o) 21 & 22 Vict., cap. 56, §§ 12, 13, 14.

(p) See *Clelland v. Weir*, 10 March 1848, 10 D. 924 ; *Thomson v. Campbell*, 14 June 1837, 15 Sh. 1183 ; *Barstow v. Inglis*, 5 Dec. 1857, 20 D. 230 ; *Anderson v. M'Culloch*, 29 Jan. 1846, 8 D. 419.

(q) *Donaldson v. Ord*, 5 July 1855, 17 D. 1058.

(r) *Thomson v. Campbell*, *supra*. See also *Gray v. Walker*, 11 March 1859, 21 D. 709.

(s) *Nicol & Carnie, v. Wilson*, 10 June 1856, 18 D. 1000.

(t) *Milne v. Milne*, 13 June 1850, 12 D. 1007 ; *Gilmour v. Mure*, 18 July 1850, 12 D. 1266. See *Pet. Macfarlane*, 6 March 1857, 19 D. 656.

CHAPTER LXIII. the truster was holder, it was held to be a sufficient defence, that the executors had information that the bill was granted for accommodation. The fact that they had, at the request of the beneficiary, raised an action after the elapse of the sexennial prescription, in which the defender, on a reference to oath, deponed *negativè*, was considered immaterial.(u)

Meaning of rule that executors are charged with interest after the elapse of a year.

1955. It has been laid down in works of authority, that executors are allowed a year for the collection and realisation of the assets of the defunct,(x) during which time they are not chargeable with interest. The meaning of this rule, as observed by Lord Jeffrey in commenting upon its application to entail cases, is, that they are not to be chargeable for interest on outstanding debts during the first year, beyond the amount which they have actually received.(y) After the lapse of a year, they are presumed to be in default, and will be charged with interest, unless they are able to show that the failure to recover was not attributable to their neglect.(z)

Trustee's right to call for documents.

1956. With a view to facilitate the recovery of assets, trustees are entitled to the possession of all documents of debt belonging to the trust; and they are also entitled to call for statements of accounts from bankers or others alleged to be in possession of the trust-funds, and, if necessary, to call for the production of documentary evidence.(a) But they cannot enforce the unconditional delivery of documents to which other parties have a preferable right.

Compensation as to trust-debts.

1957. In the administration of the trust, a demand made against a debtor to the estate cannot be met by setting off a debt due to the debtor by the trustees who make the demand; for there is here no proper *concursus debiti et crediti*.(b) Neither is there concurrence where a trustee demands a private debt from one who is a creditor under the trust. But where a demand is made by trustees for a debt due to the trust-estate, it may be met by a debt due under the trust to the defender. Again, where the debtor of the trustee is called on to pay a private debt, he being a creditor under the trust and the trustee the *sole* intromitter, there is room for doubt whether there may not be compensation.(c)

(u) *More's Exrs. v. Malcolm*, 24 Jan. 1835, 13 Sh. 318. In the same case, executors were held not liable for referring a doubtful claim to arbitration.

(x) Shaw's Bell's Com. 658; Bell's Pr. § 1900; *Campbell v. Reid*, 15 June 1840, 2 D. 1084. See section 3, *infra*.

(y) *Howat's Trs. v. Howat*, 17 Feb. 1838, 16 Sh. 627, note.

(z) See 30 & 31 Vict., cap. 97, § 2.

(a) *Clark v. Mitchell*, 17 June 1825, 4 Sh. 102, N. E. 108; and see *Wotherspoon v. Laidlaw*, 17 Nov. 1843, 6 D. 88; *MacLachlan v. Meiklam*, 9 July 1857, 19 D. 960.

(b) 1 Bell's Com. 5th ed. 89.

(c) See *Hay v. Brown*, 22 Dec. 1825, 4 Sh. 344, N. E. 348; and cases in Shaw's Digest, *voce* "Compensation," pp. 293-4.

1958. Trustees cannot be too anxiously reminded that any delay in the recovery of debts due to the estate will be at their own personal risk; the fact that the testator had left the money in the hands of one of their number, or invested on personal security, being no justification to executors who neglect the primary duty of bringing the trust-funds into a position of security. (d) A trustee will, on the same principle, be liable for any loss sustained by the estate in consequence of his discharging a security, or improperly consenting to the liberation of a debtor. (e)

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Diligence prest-
able by trustees.

1959. In *Forman v. Burns* (f) an executor found among the securities of the defunct a promissory note for £250, dated more than two years prior to his death, and payable one day after date. Instead of immediately raising action on the note, the executor allowed two months to elapse, and then wrote, through his agent, requesting payment. The demand was repeated several times in the course of the ensuing three months, and the debtor then transmitted his brother's acceptance for £280, as an additional security. Ultimately, but not till fifteen months after the date of confirmation, a payment of £50 to account was obtained, and the principal debtor soon after became bankrupt. A claim having been made by the representatives of the payee against the executor, on the ground that he had neglected timeously to use diligence on the bill, it was urged in defence, that, from the executor's knowledge of the circumstances of the obligant "he believed that any premature use of diligence might greatly injure the chance of speedy or ultimate recovery;" also, that he was himself largely interested in the estate, and that, his office being gratuitous, he was not liable in exact diligence. The Court, with evident reluctance, found that the executor was liable for the consequences of his omission, Lord Colonsay observing, with regard to his position as a beneficiary, that it was no excuse that an executor chose to risk himself as well as the executry fund. Lord Fullerton said, "This is one of the hardest cases I ever met. The executor, on coming into office, found this bill as an investment which the deceased himself had entered into years before his death; and I think he was entitled to exercise some discretion as to continuing the investment, or enforcing payment. It is true that he gave time to the debtors; but I am hardly satisfied

Consequences of
delay in the
recovery of
assets of the
trust.No excuse that
executor was
personally in-
terested as a
creditor.

(d) *Moffat v. Robertson*, 31 Jan. 1884, 12 Sh. 869; *Cochrane v. Black*, 17 D. 322, 19 D. 1019; *Marshall v. Milne*, 1677, 1 Br. Sup. 780; *Forman v. Burns*, *infra*. In *Gourlie v. Dumbreck*, 1710, M. 16,192, a trustee, who admitted that he had received a payment to account, but neglected to

preserve evidence of the amount, was charged with the whole sum.

(e) *Abercrombie v. Innes*, 1724, Robertson, 457; *Stirling v. Cunninghame*, 1689, M. 16,168.

(f) *Forman v. Burns*, 2 Feb. 1858, 15 D. 862.

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that he did so entirely out of tenderness for them. I think he may have been in some degree influenced by the hope, that if he did not press too hard, there would be a better chance of recovering the debt. But executors must be taught that they are bound to exercise some diligence ; and on that broad principle, I think the safest course is to adhere.”(g)

Diligence prest-
able by factors
and agents.

1960. A party in the position of an agent, factor, or manager, who is paid for his services, is of course, *a fortiori*, liable for any neglect in using diligence upon the debts which he is intrusted to recover.(h) On this principle, the trustee of a sequestrated estate, having neglected to present an abbeviat of adjudication for registration, as directed by the Statute, was amerced in the expense of an application to the Court for a special warrant for registration.(i) It appears from the cases cited by Mr Lewin,(k) that trustees subject to the jurisdiction of the Court of Chancery are, in like manner, accountable for the consequences of negligence in the recovery of assets. In one of the leading cases Sir Thomas Plumer remarked,—“If persons accept the trust of executor, they must perform it ; they must use due diligence, and not suffer infants to be injured by their negligence. If there be *crassa negligentia*, and a loss sustained by the estate, it falls upon the executors.”(l)

Practice of the
Court of Chan-
cery in relation
to the recovery
of assets.

(g) 15 D. 864 ; compare the English case of *Lawson v. Copeland*, 2 B. C. C. 156.

(h) *Wemyss v. Wilson*, 1674, M. 8588 ; *Stark v. Mackay*, 1714, M. 8540. See *contra*, *Stewart v. Falconer*, 14 Dec. 1880, 9 Sh. 178—a bad precedent.

(i) *A. B.*, 21 Dec. 1855, 18 D. 286.

(k) Lewin on Trusts, 5th ed. p. 286.

(l) *Tebbs v. Carpenter*, 1 Mad. 296. In this case the rents of certain real property were vested in executors, upon trust, for the purpose of accumulating the proceeds, and arrears were allowed to accumulate to the extent of £1500. The executors were charged with the whole sum, but without interest. In *Caffrey v. Darby*, 6 Ves. 488, trustees to whom a leasehold property, with stock-in-trade, etc., had been assigned, subject to the proviso that the truster's husband should be allowed to remain in possession so long as he paid the instalments mentioned in the deed, were made responsible for the loss accruing to the wife, in consequence of their allowing the husband to remain in possession after he had failed to pay up the stipulated instalments. In *Booth v. Booth*, 1 Beav. 125, 8 L. J. Ch. 39, and *Lincoln v.*

Wright, 4 Beav. 427, 10 L. J. Ch. 881, Lord Langdale held co-executors liable for property of the testator left in the hands of the acting executors. More recently, Lord Cottenham, on a careful review of the previous authorities, and with the declared intention of settling the principles of this branch of law, pronounced decree against two executors for the sum of £12,000 and upwards, which was due by their co-executor to the testator at the time of his death, and which was lost in consequence of the bankruptcy of the executor six years thereafter; *Stiles v. Guy*, 1 Macn. & G. 422, 19 L. J. Ch. 184. This was a strong case, for by the will the trustees were not to be “answerable for any more of the trust-moneys than they should respectively receive, but each for his own acts, receipts, and wilful defaults only ;” and the direction was to realise and get in “securities for money not approved by them.” But, said the Lord Chancellor, “The direction in the will, that the creditors should call in securities not approved by them, must be considered as referable to securities upon which a testator's property might, from their nature, be invested,

1961. Trustees are placed in a most difficult and trying position when the bulk of the trust-estate consists of a share in a going business, and no special power is given to them to carry it on for the benefit of the family.^(m) Where the amount which could be realised by the sale of the good-will and stock-in-trade is small in proportion to their value as part of a going concern, trustees will often, from a regard to the real interests of their constituents, elect to continue the business, and run the risk of liability in the event of failure. If a trustee does not feel justified in exposing himself to the hazard of personal liability, he ought, if he believes that the continuance of the business is the most prudent course of administration, to decline the trust, and leave the responsibility of management to the Court. Should he, on the contrary, think that the ultimate realisation of the concern is more to the advantage of the family, he may accept the office with safety; for he is under no obligation to damage the property by forcing on an immediate dissolution of the concern. On the contrary, it will be his duty to wind up cautiously, and so as, if possible, to secure full value for the capital and skill already embarked by the truster in the business. If there are other partners, he must take care that his constituents are allowed their full share of profits while their money remains in the concern, and by no means agree to any arrangement for leaving it in the business on loan.⁽ⁿ⁾ It must be added, that trustees who take the management of a business, even for no other purpose than that of immediate winding up, are not entirely exempt from personal risk, because they are not only liable *ad factum præstandum* for the fulfilment of contracts, but may also come under liability to creditors, as parties to bill transactions and the like, against which they have only the security of the trust-estate.^(o)

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Duty of trustees where the trust-estate consists of a mercantile business.

1962. Shares in joint-stock companies do not materially differ from partnership interests as regards their eligibility for the purposes of trust investment. In the present uncertainty of the law on this subject, trustees cannot be advised to continue such investments, as even where they are expressly authorised the trustees may incur liability to creditors. As to the time within which they ought to realise, there is no positive rule. In the recent English case of *Hughes v. Empson*,^(p) where the testator died possessed of

Duty where trust-estate consists of shares in joint-stock companies.

and not as authorising a kind of investment which a Court of Equity could not sanction" (19 L. J. Ch. 187).

^(m) See an instance of such a power in *Ross v. Masson*, 3 Feb. 1843, 5 D. 483.

⁽ⁿ⁾ *Cochrane v. Black*, 17 D. 322, 19 D. 1019; *Laird v. Laird*, 26 June 1855, 17 D.

984; 28 May 1858, 20 D. 972; *Guthrie v. Fairweather*, 16 Dec. 1853, 16 D. 214; *Graham v. Keble*, 10 Nov. 1818, 2 Dow, 17.

^(o) *Thomson v. Campbell*, 16 Feb. 1838, 16 Sh. 560; and see chapter 78 (Liability of Trustees to Creditors of the Estate).

^(p) *Hughes v. Empson*, 22 Beav. 181.

CHAPTER LXIII. Crystal Palace shares, it was held that the trustees had a discretion not to sell until the end of twelve months; and in a previous case, Lord Cottenham decided that executors were justified in continuing to hold Mexican bonds which they only sold in the course of the second year from the testator's decease. *(q)*

Acc. of Court v. Baird. **1963.** In the well-known case of *Baird*, *(r)* the Accountant of Court, acting under the authority of the Pupils Protection Act, had appointed the respondent to consign a sum of upwards of £25,000, the property of a minor, which had been lost in consequence of the tutor having neglected to sell shares of the Western Bank. But the Court would not presume that the respondent had acted indiscreetly in holding for the period of *two* years; for, as Lord Deas observed, there was no rule requiring the tutor to sacrifice the estate by immediate realisation; and where, as in this case, the estate, valued at more than £150,000, consisted mainly of shares of joint-stock iron and other companies, which could not have been thrown at once into the market and disposed of, except at a ruinous sacrifice, his Lordship thought it would have been a positive dereliction of duty to sell with precipitation. *(s)*

Duties of trustees in relation to the management of heritable property.

1964. A less rigorous view of the responsibility of trustees has been taken with reference to charges of alleged omission or neglect in the collection of arrears of rents, or debts prestable during the continuance of the trust. In realising the truster's assets there is little room for discretion or forbearance, the executor having an imperative duty to perform, namely, to reduce into possession the whole of the truster's available means and estate as it exists at his entry on the duties of his office. But in the case of a continuing trust, other considerations come into view. A trustee of heritable property must act as a prudent landlord, administering the trust-property in the same manner as he would manage his own; and it must always be a matter of discretion in the management of property, whether to press for immediate payment at the risk of crippling the resources of the tenant. The management of an estate, although infinitely less speculative in its nature than that of a mercantile business, carries with it the risk of occasionally making bad debts; and if the Court is satisfied that the management has been on the whole beneficial, it will not, and it would be unjust that it should, enforce the rules of strict diligence against trustees in respect to any arrears of moderate amount which they may have failed to reduce into possession. *(t)*

(q) *Buxton v. Buxton*, 1 M. & C. 80; and see *Orr v. Newton*, 2 Cox, 276.

(r) *Acct. of Court v. Baird*, 29 June 1858, 20 D. 1176.

(s) 20 D. 1184-5.

(t) *Cameron v. Anderson*, 12 Nov. 1844, 7 D. 92; *Miller's Trs. v. Miller*, 28 Feb. 1848, 10 D. 765. See Ersk. 8, 8, 83.

1965. On this principle it was held that trustees had not exceeded the bounds of discretion in discharging certain arrears of rent, when such discharge was made one of the conditions on which the tenant agreed to accept a renewal of his lease at an increased rent.^(u) The Court, however, have disapproved of a course of management under which the tenant was allowed to be systematically in arrear, the trustees taking bills for the rents; and should loss result from indulgence of this kind, there can be little doubt the trustees would be liable for the deficiency.^(x) In the granting of abatements to tenants, and of allowances for improvements, trustees will use the same discretion as fee-simple proprietors.^(y)

1966. A trustee, whether acting under a testamentary disposition or for behoof of creditors, ought to be careful not to enter rashly into the possession of tacks or leasehold interests; both because the management of a farm or of subjects leased in connection with a going business is attended with hazard to the estate, and because the unconditional adoption of a lease will render the trustee himself personally liable for arrears of rent due prior to the period of his entry.^(z) In one of the cases, a landlord had accepted bills for the unpaid arrears prior to the date of sequestration; and it was argued, but unsuccessfully, for the trustee on the sequestrated estate, that he had thereby abandoned his personal recourse against the trustee as assignee of the lease, and was therefore only entitled to rank as a creditor. Lord Justice-Clerk Hope observed:^(a) "The known rule of law must apply, that the assignee of a lease is liable for unpaid arrears of rent; that is the burden which attaches to the assignee of a lease—in the same way as liability for unpaid feu-duties attaches to the purchaser of property. It is the corresponding duty of each to see that the property is clear of all bygone claims; if he does not do so, it is at his own risk." The trustee will therefore consult his own safety by arranging with the landlord to waive any preference for prior arrears, or by obtaining his accession to the trust—which has been held to imply a waiver of such preference.^(b) A trustee may render himself liable in damages

Trustees adopting leases incur liability for arrears of rent.

^(u) *Edmond v. Dingwall's Trs.*, 16 Nov. 1860, 23 D. 21. In the same case the trustees were found entitled to take credit for a considerable sum expended in draining the estate.

^(x) *Per* Lord Justice-Clerk Hope in *Dundas v. Morrison*, 20 D. 228.

^(y) *Gill v. Earl of Fife's Trs.*, 8 July 1823, 2 Sh. 460, N.E. 412; see *Kay v. Miln*, 4 Feb. 1830, 8 Sh. 487. As to the

trustee's power to execute improvements, see chapter 58.

^(z) *Fairlie v. Neilson*, 18 Dec. 1821, 1 Sh. 222, N.E. 211; *Stead v. Cox*, 20 Jan. 1835, 13 Sh. 280; *Dundas v. Kirkcaldy's Trs.*, 21 June 1853, 15 D. 752; 4 Dec. 1857, 20 D. 225.

^(a) *Dundas v. Kirkcaldy's Trs.*, 20 D. 228.

^(b) *M'Gregor v. Hunter*, 21 Nov. 1850, 13 D. 90.

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to the landlord by retaining possession of the subjects, and refusing to concur in an arrangement for a lease to a third party, even in circumstances which do not imply an adoption of the lease.(c)

Signing receipts for money held to be an act of intromission.

1967. When money is paid to a body of trustees, whose concurrent receipt and acknowledgment is necessary to warrant payment and to discharge the debtor, the payment is made equally to all, not only in the estimation of law, but in fact.(d) However, as both trustees cannot actually receive, although they both must join in signing the receipt, the money may be uplifted by one, for the purpose of *immediate* investment, without responsibility on the part of concurring trustees.(e) But if the sum is large, the safer course is, that it should be at once deposited in bank, and placed to the account of the trust-estate without being paid to either trustee personally; otherwise, in the event of the money being retained by one of them for any length of time, his colleagues will undoubtedly be liable for the failure of their co-trustee;(f) a liability from which no clause of indemnity for acts of omission can afford protection.(g)

Debtor paying to trustees not bound to see to the application of the money.

1968. By the law of Scotland, executors confirmed have power to grant effectual discharges for all moveable funds or effects of the defunct ingathered by them. Debtors are therefore safe to pay on demand, without requiring to see to the application of the money.(h) And it would seem that a debtor paying to an English administrator whose title is unexceptionable,(i) is safe from any claim at the instance of a Scotch executor afterwards appointed.(k) In the event of the death of one of several executors-creditors, the debtor is not bound to pay to the survivors, but may insist on confirmation being expedite to the share of the deceased creditor, in order that his executor may be made a party to the discharge.(l)

Debtor may be liable if participant in fraudulent appropriation.

1969. It must be understood, however, that the executor's re-

(c) *Stead v. Cox, supra.*

(d) *Per Lord J.-C. Hope in Seton v. Dawson*, 4 D. 820.

(e) *Urquhart v. Brown*, 7 June 1848, 5 D. 1142; but see *Macnair v. Bloomfield*, 24 June 1880, 8 Sh. 969, and *infra*, chap. 74, sect. 3, as to the general question of joint liability.

(f) *M'Clymont v. Hughes*, 14 Feb. 1827, 5 Sh. 846, N.E. 821; *Kennedy v. Wightman*, 28 June 1827, 5 Sh. 852, N.E. 792.

(g) *Moffat v. Robertson*, 31 Jan. 1884, 12 Sh. 369; *Seton v. Dawson*, 18 Dec. 1841, 4 D. 810.

(h) In England there seems to be some doubt as to the power of a trustee to grant a discharge which will relieve the debtor from the necessity of inquiring as to the

application of the money. The tendency of the recent cases respecting payment of personalty debts is towards the recognition of the Scotch doctrine; but the law as to payment of the price of real estate is still involved in uncertainty. See this subject considered in connection with Trusts for Sale, chapter 64, sect. 2.

(i) See *Lewin on Trusts*, 4th ed. 223; and cases of *Glynn v. Locke*, 8 Dru. & War. 11; *Fernie v. M'Guire*, 6 Ir. Eq. R. 137, & *Ford v. Ryan*, 4 Ir. Ch. R. 342, there referred to.

(k) *Hutchison v. Aberdeen Banking Co.*, 9 June 1887, 15 Sh. 1100.

(l) *Morris v. Stewart*, 28 Feb. 1852, 14 D. 576.

ceipt will not protect the debtor from liability if he has been participant in a misappropriation of the fund, or has knowingly paid it on the order of the executor to the individual account of the latter. (m) In the case of *Taylor v. Sir William Forbes & Co.*, the executor was partner in a concern which was largely indebted to the same bank in which the trust-funds were deposited. Being pressed for payment, the executor ordered the trust-funds to be transferred to the account of the company of which he was a member; and that company having soon afterwards become insolvent, an action was raised against the bankers by a beneficiary under the will to recover the money which had been thus fraudulently transferred. The bankers were assoilzied by the Court of Session, on the ground that they were not bound to inquire into the terms of the trust-settlement; but the House of Lords, being satisfied that the law agents of the banking company were *actually cognisant* of the trust, reversed the interlocutor, and directed an issue to try the question, whether, when the respondents received the money, they knew that it was part of the estate of the defunct, and that the executor held it subject to the trusts declared by his will. (n) This decision may be supported on the general principle, that the beneficiary is entitled to follow the trust-funds into the hands of any party receiving them in wilful contravention of the trust purposes; a principle which was distinctly recognised in our older practice. (o)

1970. The consideration, on the one hand, of the great importance (viewed in relation to the comfort and well-being of families) of insuring the acceptance of trusts by persons of the truster's own selection, or appointed by those who possessed his confidence; and, on the other hand, of the inconvenience and hazard inseparable from the continued administration of trust-estates by gratuitous trustees, unable to give more than an occasional and intermitting attention to the interests of the trust, have led, in Scotland, to the introduction of the system of management through the intervention of paid factors, under the supervision and subject to the control of the trustees. Trustees are generally empowered to name a factor by the terms of the trust-settlement; and, independently of special authority, they seem to have the power at common law. (p) Some-

Management of trust-estates by factors, and whether trustees are entitled to delegate.

(m) *Taylor v. Sir W. Forbes & Co.*, 14 Dec. 1830, 4 W. & S. 444, reversing 5 Sh. 785; *Barnet v. Duncan*, 14 Dec. 1831, 10 Sh. 128.

(n) 4 W. & S. 455.

(o) *Tait v. Kay*, 1779, M. 8142; *Alison v. Fairholme*, 1765, M. 15,182.

(p) *Sym v. Charles*, 13 May 1830, 8 Sh. 741; Bell's Pr. § 1998. The power is also

expressly given by Statute 30 & 31 Vict., c. 97, § 2. In trusts where the appointment of a factor may not be considered necessary, the trustees are still entitled to perform the duties of the office, so far as not discretionary, through the instrumentality of a paid agent; *Hay v. Binny*, 19 Feb. 1861, 28 D. 594.

CHAPTER LXIII. times a factor is nominated in the settlement; in which case it has been considered that the trustees have not the power of superseding him, unless upon some reasonable ground of complaint.^(q) The duties of factors are necessarily the same as those of the trustees whom they represent. It is therefore unnecessary to treat of them as a separate topic. The subject of the liability of trustees for their factors will be discussed in another chapter.^(r)

SECTION II.

OF THE SAFE CUSTODY OF THE ESTATE.

Responsibility
of the trustee
for the preser-
vation of the
estate.

1971. By the civil law, a mandatory, although he could take no benefit by the contract, was liable in exact diligence;^(s) but the doctrine of the law of Scotland is different, being founded on the broad principle that the nature of the diligence prestable depends upon the interest which the contracting party has in the fulfilment of the contract. The office of trustees being gratuitous, they are accordingly held to be liable only for actual intromissions, and for such diligence in respect to matters omitted as they might be expected to employ in their own affairs.^(t) “The Court,” said Lord Justice-Clerk Hope, “will judge favourably and leniently and kindly of gratuitous trustees when they have addressed themselves to the performance of their duty,—have taken steps and given the directions which might be expected,—but have unexpectedly failed to do what they proposed, especially if from the fault of others.”^(u) Trustees are called upon to exert special solicitude in the management and custody of funds actually reduced into possession; because the participation in any act of possession, actual or constructive, is regarded as an intromission; and the trustee becomes from that time responsible for the custody of the property, and liable for the acts of his co-trustees in relation to it.

Responsibility
for loss by rob-
bery or fire.

1972. It may be laid down, on the authority of English precedents, that trustees are not liable for the loss of property by robbery.^(x) It is to be understood, however, that if trust-funds are improperly retained by the trustee in his own custody, when they

(q) Bell's Pr. § 1998; *Fulton v. M'Alister*, 15 Feb. 1831, 9 Sh. 442; *M'Cuaig v. M'Aulay*, 22 June 1836, 14 Sh. 318.

(r) Chap. 74, sect. 4. The question—what Court has authority to enforce the administration of a trust—might be considered in this place. Questions of jurisdiction may, however, be more appropriately considered in connection with the general subject of International Law to

which they appertain. To the chapter on that subject we accordingly refer:—Chapter 2, section 7 (International Law—Jurisdiction).

(s) Cod. lib. 4, tit. 35, l. 13.

(t) Ersk. 3, 3, 36; *Saton v. Dawson*, 18 Dec. 1841, 4 D. 328, *per* Lord Moncreiff.

(u) 4 D. 324.

(x) *Morley v. Morley*, 2 Ch. Ca. No. 1, Eq. Ca. Abr. 397; *Jones v. Lewis*, 2 Ves. sen. 240.

ought to be invested or deposited in bank, he will be answerable for the loss. It has been held by the Court of Chancery, that an executor is not answerable for the loss of uninsured house property by fire ;(y) but we do not think that a trustee could safely neglect such a usual precaution, at least in the case of urban subjects. CHAPTER LXIII.

1973. Trustees are responsible for the safe custody of title-deeds and other documents belonging to the trust ;(z) and they are bound to exhibit them to the heir or other party having an interest.(a) Trustee entitled to the custody of title-deeds. It has been found that testamentary trustees were not entitled to withhold delivery of papers found in the repositories of the defunct, which were the property of certain beneficiaries against whom they tended to establish a charge of circumvention ; but, in the circumstances, the documents were allowed to be inspected by a judicial commissioner, and an inventory taken, specifying the documents by date and post-mark. Trustees have been also held entitled to interdict against removal of the title-deeds and securities of the trust-estate, pursuant to an order of the Court of Chancery in England, in so far as affecting property as to which the *forum* of distribution was in Scotland.(b)

1974. It is the duty of trustees to deposit in bank in a separate account(c) all monies lying in their hands, whether for distribution or for the purpose of investment, at a suitable opportunity; and if the bank is in good credit, they will not be answerable for losses in the event of failure.(d) Uninvested trust money ought to be deposited in bank in an account in name of the trust. Judicial factors subject to the rules established by the Pupils Protection Act, are required to lodge the money in their hands in some one of the banks of Scotland established by Act of Parliament or Royal Charter, in an account or on deposit in their names, as judicial factor on the estate.(e) Although it has never been decided in Scotland that trust-money must be lodged in a *chartered bank*, it has been the practice to do so ; and it would not be safe to deposit any large sum in the hands of a private banking company.

(y) *Bailey v. Gould*, 4 Y. & C. 221 ; 9 L. J. Exch. Eq. 48. In this case Mr Baron Alderson said, that the loss of the property—the building in question—was not the fault of the trustees ; and as to the alleged breach of duty in not insuring, it appeared that the surviving partner, who was also interested to insure, had not considered it necessary, which was a fair criterion in a question of wilful neglect.

(z) *Wotherspoon v. Laidlaw*, 17 Nov. 1848, 6 D. 88 ; *MacLachlan v. Meiklam*, 9 July 1857, 19 D. 960.

(a) *Liddell v. Wilson*, 19 Dec. 1855, 18 D. 274 ; but see *Cathcart v. E. of Cassillis*, 1795, M. 8998 ; *Douglas v. Holmes*, 19 July 1854, 16 D. 1116 ; *Wilson v. Gilchrist's Tr.*, 18 D. 636.

(b) *MacLachlan v. Meiklam*, *supra*.

(c) If he deposits the funds to his own credit he will be liable in penal interest ; *Clark v. Boswell*, 17 Dec. 1856, 19 D. 187.

(d) *Pearson v. Grierson*, 19 Nov. 1825, 4 Sh. 205, N. E. 208 ; *Seton v. Dawson*, 4 D. 828, *per* Lord Moncreiff.

(e) 12 & 13 Vict., c. 51, § 5.

CHAPTER LXIII.

Transferences of
trust-funds to
judicial factor or
new trustee.

1975. In the event of the trust devolving upon other parties, which may happen by the resignation of the original trustees under a power, or under the provisions of the Trustee Act, 1861, or in consequence of the appointment of a judicial factor, the original trustees are not bound to pay to their successors individually, but may transfer the funds to the credit of their bank account, or make consignation in a pending process. *(f)* But a beneficiary is not entitled, upon raising a multiplepoinding, to demand consignation of trust-money invested in bank in name of a sole trustee, against whose management no complaint has been made; *(g)* “for,” as observed by Lord Colonsay, “consignation imposes a limit upon the revenues to be derived from the fund, for the trustee might find a safe investment to yield a better interest than bank interest.” *(h)*

Liabilities of
trustees for
money deposited
or paid into
bank.

1976. Trustees are not liable for the loss of money deposited in bank by the truster, and left there until an investment is obtained. *(i)* Thus, in a case where a Scotch executor found the residue of the succession, consisting of upwards of £7000, deposited in the hands of a private banking company in England, who paid five per cent. interest upon deposits, and he did not think it necessary to disturb the investment, and the bankers afterwards became insolvent in consequence of the failure of their London correspondents, the Court, reversing the interlocutor of the Lord Ordinary, found that the executor was not liable for the loss. It was observed, that if he had made choice of the bank, and placed the money there, the presumption would have been against him; but as he had found

(f) *Mackenzie v. Grieve*, 20 Dec. 1828, 7 Sh. 228; and see *Watson v. Crawcour*, 9 June 1848, 5 D. 1182. The unfortunate results of *payment* to the new administrator are exemplified in the case of *Donaldson v. Kennedy*, 18 June 1888, 11 Sh. 740, where a trustee had to refund, although protected by a clause of indemnity.

(g) But where a trustee delays the distribution of the estate, and is unable to show the Court that the funds with which he is chargeable are invested so as to be distinguishable from his personal funds, he will be ordered to consign immediately; *Falconer v. Falconer*, 18 July 1855, 17 D. 1106.

(h) *Kerr v. James*, 27 May 1857, 19 D. 758. A trustee may be required to find caution for his intromissions in special circumstances; *Ryrie v. Ryrie*, 7 March 1889, 1 D. 647.

(i) *Gibb v. Gibb*, 1769, M. 16,868; *Pearson v. Grierson*, 19 Nov. 1825, 4 Sh. 205-8.

In *Johnston v. Newton*, 11 Hare, 169, 22 L. J. Ch. 1089, Vice-Ch. Wood dismissed a suit against executors for recovery of funds left in the hands of the testator's bankers, and which had been lost by the failure of the bankers within twelve months after the testator's death. As to the general principle, the Vice-Chancellor had no doubt: as the testator could not any longer exercise a discretion in judging of the position of the bankers, the trustee must exercise *his* discretion, and if he erred must bear the loss. But in this case the executors were bound, in the first place, to look to the various liabilities of the estate before settling with the residuary legatee; and the rule was, that they had twelve months to do this. The money was property left at the bankers, for the trustees were not bound to know that no more debts would be brought forward, nor were they bound to distribute until the expiration of twelve months. But see *Spode v. Smith*, 8 Russ.

the money producing interest at five per cent., in a bank in good credit, he was not bound to disturb the testator's investment. (k) CHAPTER LXIII.

1977. A trustee will be answerable for injury resulting in consequence of his putting the securities of the estate beyond his control, as by investing in the joint names of himself and another party, (l) or by delivering a bond or other document of debt before the consideration money has been paid for it; (m) in which case, it would seem, the document itself may be recovered at the suit of the beneficiary. (n) But if the security is taken by trustees in favour of beneficiaries who have the residuary interest, the Court will not hold the trustees precluded from resuming possession of the funds for the benefit of those who may be found to have a preferable interest. (o) Trustees amenable to the jurisdiction of the Court of Session ought not to invest in foreign securities. If it should happen that the testator's assets are situated beyond the jurisdiction of the Court, the trustee who has realised cannot escape from his obligation to account to the Court of Session by alleging that he is under a similar obligation to the courts of the foreign country; for, although it may be necessary *pro forma* to assume the character of administrator in the *locus rei sitæ* for the purpose of recovering the estate, the administration of the funds, after reduction into possession, cannot be subject to a divided responsibility. (p) It is unnecessary to add, that a trustee who deliberately misappropriates the trust-estate, as by conveying trust-property to a stranger, or by uplifting consigned money and applying it to his own purposes, is guilty of a punishable offence. In cases of this description, the Court may direct proceedings to be instituted against the trustee and, if he is an agent, may remove him from the rolls. (q)

Neglect of duty by putting the trust-funds or securities beyond the trustee's control.

Investment in foreign securities.

Wilful misappropriation of trust-moneys.

1978. A trustee of funds invested in the joint names of himself and other trustees, is bound to concur with his colleagues in uplifting the funds, as well as in other necessary acts of administration; for, by accepting the office of trustee, he agrees to submit to the

Trustee bound to submit to the opinion of the majority.

511, "rather a strong case, and a hard one;" *per* Wood, V.-C., in *Johnston v. Newton*, *supra*.

(k) *Pearson v. Grierson*, 4 Sh. 207, N. E. 210.

(l) *Accountant of Court v. Geddes*, 29 June 1858, 20 D. 1174.

(m) *Thomson v. Christie*, 16 June 1852, 1 Macq. 236.

(n) See *Mair v. Thom's Trs.*, 20 Feb. 1850, 12 D. 748.

(o) *Buik v. Pattullo*, 14 Nov. 1854, 17 D. 45.

(p) *Blackett v. Gilchrist*, 30 May 1832,

10 Sh. 590; *Ferguson v. Menzies*, 21 May 1830, 8 Sh. 782; *Simpson v. Doud*, 1 Feb. 1855, 17 D. 815; *Account. of Court v. Geddes*, 29 June 1858, 20 D. 1174.

(q) *Account. of Court v. Dewar*, 8 Dec. 1858, and 7 Feb. 1854, 16 D. 163, 489; *Steven's Trs. v. Fraser*, 8 March 1836, 14 Sh. 676. And if a trustee mix trust-property with his own, the beneficiary is entitled to any portion of the blended property which the trustee cannot prove to be his own. See *Gray v. Haig*, 20 Beav. 219; and *Duke of Leeds v. E. of Amherst*, 20 Beav. 239.

CHAPTER LXIII. opinion of the majority, and if he were permitted to resist that opinion, he would be virtually in the position of a *sine qua non*.^(r) If he conceives that the proposed act of administration is illegal or unsafe, his remedy is to apply to the Court for the supercession of the trust.

Distinction between actual and constructive intromission: managing trustees.

1979. By the Trustee Act 1861^(s) it is declared that trusts shall be held to include a provision that each trustee shall only be liable for his own acts and intromissions, and shall not be liable for omissions. But the protection accorded to trustees by a clause in these or similar terms, does not differ materially from that which they enjoy at common law. Where the nature of the trust is such as to require a continuing management, it would be inconvenient and impracticable to insist upon every intromission being accredited by the whole body of the trustees. It is not unusual in such cases, more especially if authority to that effect is given by the settlement, to confer the powers of a factor on one of the trustees. Even where there is no continuing management, it may be necessary, for the more convenient distribution of the funds amongst a number of beneficiaries, to authorise one of the trustees to make drafts upon the joint account. It has been held, where such a power was given for the *bona fide* purpose of facilitating the immediate distribution of the estate, that trustees were not liable for loss resulting from the malversation of the funds by their colleague.^(t) But no such indulgence will be granted to trustees who, after accepting the trust and realising the estate, deliberately resign the future management of the fund into the hands of one of their number, without retaining the control over it, or taking any further interest in its management.^(u)

Seton v. Dawson

1980. In *Seton v. Dawson*, the trustees, after realising the heritable estate and signing a receipt for the price, devolved the entire management of the trust upon one of their number, James Kyd; and trusting apparently to a clause of protection in the settlement, which declared that they should not be "liable for omissions or neglect of diligence of any kind, nor *singuli in solidum*, but each only for his own actual intromissions," took no further concern in the management, and held no other meeting for upwards of eight years, by which time the managing trustee had become bankrupt and owed a large sum to the trust-estate. The question of liability

^(r) *Lynedoch v. Ochterlony*, 15 Feb. 1827, 5 Sh. 358, N. E. 832.

^(s) 24 & 25 Vict., c. 84, § 1.

^(t) *Macnair v. Broomfield*, 24 June 1830, 8 Sh. 968; *Urquhart v. Brown*, 7 June 1848, 5 D. 1142.

^(u) *Seton v. Dawson*, 18 Dec. 1841, 4 D. 811; *Sym v. Charles*, 13 May 1880, 8 Sh. 741; *Watson v. Craucour*, 9 June 1843, 5 D. 1182.

was referred to the whole Court, who, by a nearly unanimous judgment, decided that the trustees were responsible for the loss. "The trustees," said Lord Ivory,^(x) expressing what appears to have been the general opinion of the Court on the efficacy of a clause of protection, "were inexcusable for their total and reckless neglect of the estate which they had undertaken to administer. And even, therefore, had they by the most formal deed nominated Kyd (one of their own number) as factor, I should still have been of opinion that their not holding a single meeting as trustees for nine years after their acceptance, and their placing the whole funds of the estate into Kyd's hands (for their concurrence in the deeds, which alone enabled him to get the money, amounts to no less), without ever from that moment taking a single step to compel him to account, or at all to ascertain what he was doing with the estate, was enough to bring the case up to that full measure of *crassa negligentia* which undoes all legal or equitable claim on their part to protection, even under such a clause in their favour as is here founded on. Clauses of this kind do not protect against positive breach of duty. And where one accepts of the office of trustee, and thereby undertakes, as he surely does undertake to some extent, to administer or superintend the administration of the estate which the trust places under his charge, what is it, short of a breach of duty, when he stands wholly aloof and does absolutely nothing, leaving the estate in the meanwhile to run to ruin, not less effectually than if he had never taken upon him the office of trustee at all."^(y)

SECTION III.

PAYMENT OF DEBTS AND LEGACIES.

1981. Payment of the truster's debts forms necessarily a first preferable charge upon an executry estate, and, failing that, upon the truster's lands. And if payment of debts is one of the expressed purposes of the trust, it would seem that there is an implied power to sell so much of the heritable estate as may be necessary to free it from debt.^(z) In private trusts for the distribution of a succession or management of property, the trustees are entitled, six months

Power to sell trust-estate for payment of debts is implied.

At what period is the trustee bound to pay the creditors of the estate?

^(x) See the leading opinion, 4 D. 316. "Neither the protecting clause which occurs in this particular deed, nor any of the usual clauses framed for the same object, can be held to liberate trustees from the consequences of such gross negligence as amounts to *culpa lata*."

^(y) 4 D. 318; see also Lord St Leonard's remarks in *Macpherson v. Macpherson*, 11 June 1857, 1 Macq. 245.

^(z) *Henderson v. Somerville*, 22 June 1841, 3 D. 1049. See chap. 59 (Powers of Trustees).

CHAPTER LXIII.

Distinction between solvent and insolvent trust-estates.

after the debtor's death (solvency being assumed), to pay *primo venienti*, to the creditor first demanding payment, provided they are satisfied as to the subsistence of the debt. (a) They are entitled, for their own protection, to have the debt constituted by decree; but they must not put the creditors to expense by unnecessary opposition. (b) If an executor, even without the authority of his co-executors, pay legacies *bona fide* after the expiry of six months, it seems he is not liable in repetition to creditors. (c) Where the trust-settlement contemplates insolvency, or if, apart from intention, the estate is likely to prove insolvent, (d) the trustees ought not to pay any creditor in full until they have made an investigation into its solvency; and they will not be allowed to take credit for payments made in the knowledge of the fact of insolvency. (e) When exposed to double distress by creditors, their safest course is to bring an action for the judicial distribution of the estate.

Effect of the law as to *pari passu* diligence.

1982. Under the older law, executry estates were frequently put to great expense by creditors procuring themselves to be decerned executors-creditors of the defunct for the amount of their debts, with the view of acquiring preferences. To remedy this abuse, the Act of Sederunt 28 Feb. 1662 was passed, which narrates the inconvenience experienced from the then state of the law, and for a remedy in time to come declares, "That all creditors of defunct persons using legal diligence at any time within half an yeir of the defunct's death, by citation of the executors and intromettors with the defunct's goods, or by obtaining themselves decerned and confirmed executors-creditors, or by citing of any other executors-creditors confirmed, the saids creditors, using any such diligence before the expiration of half ane yeir, as said is, shall come in *pari passu* with any other creditors who have used more timely diligence by obtaining themselves decerned and confirmed executors-creditors or otherways." (f) The Statute reserves the right of posterior creditors to be joined in the office of executors, and declares their lia-

(a) *Gardner v. Pearson*, 28 Nov. 1810, F.C.; *Alison v. E. of Dundonald's Trs.* 1798, M. 16,211; *Rankine v. Gardiner*, *infra*. "According to the law of Scotland, twelve months are allowed for the purpose (of realisation and distribution). No person has right to claim against the executors of a testator before the end of a twelve-month; six months for the collection of the debts, and six months for the distribution of them, according to the disposition of the testator;" *per* Lord Redesdale in *Stair v. Stair's Trs.*, 19 June 1827, 2 W. & S. 614, 618.

(b) *Jackson's Tr. v. Black*, 31 May 1832, 10 Sh. 597; *Crawford v. Cook*, 16 Feb. 1838, 11 Sh. 406; *Gardner v. Pearson*, *supra*. See 30 and 31 Vict., cap. 97, § 2.

(c) *More's Exrs. v. Malcolm*, 24 Jan. 1835, 13 Sh. 318. See *Cathcart v. Moodie*, M. "Heir and Executor," App. No. 2.

(d) But see *Rankine v. Gardiner*, 1741, M. 16,201.

(e) *Gardner v. Pearsons*, 28 Nov. 1810, F.C.

(f) See also the rescinded Acts 1654, cap. 16 & 18.

bility for a proportionate share of the expenses of the executor first confirmed. The effect of this enactment is, that the executor cannot be compelled to pay debts till the expiration of six months from the death, unless the estate is of indubitable solvency; for, if otherwise, it is the duty of the executor to preserve it for those who may fortify their claims by diligence before the elapse of the period of six months.(g) CHAPTER LXIII.

1983. If the truster were actually insolvent at the time of executing the settlement, it is competent to creditors to reduce it in so far as it is gratuitous, under the first branch of the Act 1621, cap. 18; or, if diligence has already been begun, under the second branch of the same enactment; and it would seem that at common law a trust-deed, the benefit of which is confined to favoured creditors, or which is tainted with injustice in other respects, is reducible on the head of fraud.(h) Trust may be reduced in the case of insolvency under the Statute of 1621.

1984. In testamentary trusts, it is understood that all unsecured debts incurred prior to the testator's death are to be ranked *pari passu*, unless the deed otherwise directs. In trusts *inter vivos*, if the purpose of payment is limited to debts contracted before a specified time, posterior personal creditors may rank on the surplus estate, unless they are excluded by an onerous ulterior destination.(i) The right of a testator's family to alimentary maintenance is a debt which transmits against the trustees,(k) or other general representatives(l) of the party liable; though it is otherwise where the heir does not represent his immediate ancestor, as in the case of heirs of entail;(m) for, as the obligation transmits *jure representationis*, it cannot be binding on an heir of entail who only re- Unsecured debts.
Maintenance of truster's family.

(g) Bell's Pr. § 1900. In England trustees and executors are allowed twelve months for the realisation of the estate and payment of debts; *per* Lord St Leonards in *Macpherson's* case, 1 Macq. 249; and see remarks of Vice-Chancellor Wood in *Johnston v. Newton*, 11 Hare, 160, 22 L. J. Ch. 1089.

(h) Bell's Com. 851 (5th ed. 1, 85); *Earl of Rosebery v. M'Queen*, 1 July 1823, 2 Sh. 443, N. E. 894.

(i) *Wright v. Harley*, 2 June 1847, 9 D. 1151; *Turnbull v. Turnbull's Trs.*, 15 April 1825, 1 W. & S. 80, reversing 2 Sh. 1; as to which, see remarks of Lords Jeffrey and Moncreiff in *M'Leod v. Cunninghame*, 20 July 1841, 8 D. 1288, 1295, 1306.

(k) *M'Ewan v. M'Ewan*, 10 Feb. 1842, 4 D. 662; *Pet. Taylor*, 5 Feb. 1850, 18 D. 948, see p. 949; *Dunbar's Trs. v. Shaw*, 18

Nov. 1805, Hume, 265; *Riddell v. Riddell*, 1802, M. "Aliment," App. No. 4; *Ormiston v. Wood*, 22 Dec. 1838, 11 Jur. 232; *Miller's Trs. v. Miller*, 10 D. 765. See also *Gillespie v. Marshall*, 7 Dec. 1802, M. "Accessorium," App. No. 2; *M'Farlane v. Finlay*, 8 July 1825, 4 Sh. 158, N. E. 159; *Hardman v. Guthrie*, 6 June 1828, 6 Sh. 920; *Macdonald v. Macdonald*, 20 June 1846, 8 D. 880; *Thom v. Mackenzie*, 2 Dec. 1864, 3 Macph. 177.

(l) *Scott v. Sharp*, 1759, M. "Parent and Child," App. No. 1; *Hastie v. Hastie*, 1671, M. 416, 5922; *Drummond v. Swayne*, 28 Jan. 1834, 12 Sh. 342; *Fenton v. Scott*, 26 May 1832, 4 Jur. 457.

(m) See *Fletcher v. Fletcher*, 11 July 1838, F.C.; *Jackson v. Gourlay*, 24 Dec. 1836, 15 Sh. 813, and chapter 71 (Passive Representation).

- CHAPTER LXIII.** presents the entail. There can, of course, be no doubt as to the liability of an heir of entail to aliment those who have a claim against himself personally *ex debito naturali*.(n) Trustees are bound to give the beneficiary the benefit of any "eases" or abatements obtained in settling with the debtors on the trust-estate.(o)
- Abatements.**
- Trustee's right of retention.** **1985.** A trustee or executor is entitled to pay debts due to himself by retention, and the debt becomes extinguished *confusione* at the expiration of six months after the death of the truster, if the estate be solvent.(p) Referring to the previous chapter on legacies, we shall here only observe that as legacies are in their nature a burden on the executry estate, the executor cannot plead payment to the party having the residuary interest in answer to an action by the legatee; for he is bound to fulfil the primary purposes of the trust before disposing of the residue.(q) In this respect there is no material distinction in the duties of the trustees between debts and legacies.
- Heritable and moveable estate when liable for legacies.**

SECTION IV.

OF INVESTMENTS.(r)

- Investment on personal security inadmissible. What is meant by personal security.** **1986.** Where, by the purposes of the trust, the distribution of the fund is postponed to a distant day, it is incumbent on the trustee to invest it on proper security for the interests of all concerned. The leading consideration which the trustee ought to keep in view in the selection of an investment, is the safety, rather than the productiveness, of the security. Accordingly, it has long been a settled rule of administration, that a trustee cannot lend on personal security,(s) such as bills, notes,(t) or personal bonds;(u) for, as Lord Hardwicke pertinently observed, "a promissory note is evidence of a debt, but no security for it."(x) The intrusting of trust-funds to a factor, co-trustee, or beneficiary, on his own ac-

(n) *Muirhead v. Muirhead*, 7 July 1849, 11 D. 1262; 15 Dec. 1849, 12 D. 856.

(o) *Earl of Northesk v. Carnegie*, 1762, 4 Br. Sup. 529; *Sinclair v. Maxwell*, 1708, M. 16,186; *Chalmers v. Cunninghame*, 1785, Elch. "Trust," No. 8; *Anderson v. Lauder*, 1740, Elch. "Trust," No. 10; *Maxwell v. Maxwell*, 1667, M. 16,166.

(p) Ersk. 8, 4, 28; 2 Bell's Com. 84; *Elder v. Watson*, 2 July 1859, 21 D. 1122.

(q) See the chapter on the beneficiary's right of action, and defences competent. As to the nature of the legatee's right, the liability of the estate for interest, etc., see the chapter on Legacies.

(r) In a subsequent chapter, on the Liabilities of Trustees (chap. 74, sect. 1), we have endeavoured to summarise such of the leading English cases on the subject of legal investments as appear to be founded on principles recognised in our law.

(s) See *Anderson v. Small*, 12 Feb. 1838, 11 Sh. 382; *Watson v. Craocour*, 9 June 1848, 5 D. 1182.

(t) *Blain v. Paterson*, 28 Jan. 1836, 14 Sh. 361; *Ross v. Allan's Trs.*, 18 Nov. 1850, 18 D. 44.

(u) *Moffat v. Robertson*, 31 Jan. 1834, 12 Sh. 369.

(x) *Walker v. Symonds*, 8 Sw. 81, note.

knowledge is, if possible, more indefensible than a loan to a stranger. In either case, the trustee will be liable for all loss, including interest, resulting from the insolvency of the debtor.^(y) In a recent case,^(z) where trustees who were law agents had uplifted a portion of the trust-funds, and applied them as a temporary accommodation to one of their clients to enable him to defray the expense of carrying on a litigation, an application was made to the Court for their removal, and although the ground of complaint was obviated by the resignation of the trustees, they were found liable in the expenses of the application, on the ground that it had been occasioned by their own impropriety. In another case, the trustees of a contract of marriage, who were empowered to lend on personal security, having lent the trust-money to the husband on his acceptance, were held liable, after the husband's bankruptcy, to replace the amount.^(a)

1987. Trustees ought not to invest in the stock of railway, banking, or other companies, for it is impossible to draw any well-founded distinction, with reference to the propriety of the investment, between a joint-stock company and an ordinary partnership. In point of law, an investment in shares is an investment in trade, and therefore a speculative transaction; and the history of many of the largest, and, apparently, most prosperous joint-stock companies, proves that the liability to loss, not to mention the fluctuating and precarious character of the profits of these concerns, is as great as in the case of a private trading company. In England the rule which prohibits the investment of trust-funds in trade has been so strictly construed, that until the alteration introduced by a recent Statute,^(b) trustees were not even permitted to invest in the stock of the Bank of England,^(c) or of the East India or South Sea Companies;^(d) and were liable in payment of the difference between the depreciation of such stock and that of the public funds during the same period. Although there is a paucity of authority in the law of Scotland with reference to the liability which trustees incur to the beneficiary by investing in shares, the prevailing opinion is, that the question is ruled by the decisions relative to investments in trade, affirmatory of the English doctrine of liability.

Investment of trust-funds in shares or stock of mercantile companies.

^(y) Ersk. 3, 8, 84; and see *Sym v. Charles*, 18 May 1880, 8 Sh. 741; *Grieve v. Amos' Exrs.*, 24 June 1885, 18 Sh. 973. See *Murray v. Borthwick's Trs.*, 1797, M. 8237, and cases referred to in the last section.

^(z) *Hay v. Binny*, 10 Jan. 1861, 28 D. 594.

^(a) *Ross v. Allan's Trs.*, *supra*.

^(b) 22 & 28 Vict., cap. 85, § 82.

^(c) *Hynes v. Redington*, 1 Jones & Lat. 589; *Howe v. Earl of Dartmouth*, 7 Ves. 150.

^(d) *Trafford v. Boehm*, 8 Atk. 440; see p. 444.

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*Acc. of Court
v. Baird.*

1988. The judgment of the First Division of the Court in the case of the *Account. of Court v. Baird*(e) throws little light on the question of liability; but it exhibits an evident leaning towards the opinion that trustees would be personally liable for investments in shares effected by themselves. But the only question before the Court was, whether a tutor-at-law was bound to make immediate consignment of the value of stock of a bankrupt company in which the defunct had invested, the ground of the alleged liability being the trustee's negligence in not immediately selling out. The Court held that this was a discretionary matter, depending upon circumstances, which in that case were not ascertained. "But," said Lord Deas, "it is a very different question, and turns on very different grounds, whether the tutor is liable for allowing such investments made by the deceased to remain unchanged, and whether he would be liable had he made them himself. In the latter case, the presumption would be against him."(*f*) In a similar case, the Court refused to approve of the accounts of a judicial factor who had invested in railway debentures, a much safer security than stock; and in a subsequent petition, setting forth that the funds had since been invested in heritable security, they refused to allow the factor to take credit for the expenses of the first application.(*g*)

Trustee investing trust-money in trade is accountable for the profits, and liable for losses.

1989. If a trustee invests the money of his constituent in trade, either by lending it at interest or for a share of the profits, there can be no doubt that he is liable as for a breach of trust; and the liability seems to be equally clear, where the money is merely left in the business in which the truster had placed it, unless the trustee has been specially authorised to continue the investment. We are assuming here that the money is left as a permanent investment; for we have seen, in considering the subject of realisation, that the trustee will not be responsible for loss in consequence of an unexpected failure prior to the time at which he might be reasonably expected to inform himself as to the state of the truster's funds, and to take measures for reducing them into possession. If the trustees are themselves personally interested in the concern in which the funds have been allowed to remain, they will be liable not only in the event of loss, but also, in the event of profit being made, for a share of the profits of the business,(*h*) in the ratio of the proportion which the trust-funds bear to the other capital em-

(e) *Account. of Court v. Baird*, 29 June 1858, 20 D. 1176.

(*f*) 20 D. 1184.

(*g*) *Pet. Morrison*, 5 Dec. 1856, 19 D.

132, reported in the first stage as *A. B.*, *Petr.*, 29 June 1854, 16 D. 1004.

(*h*) *Laird v. Laird*, 26 June 1855, 17 D. 984; *Cochrane v. Black*, 1 Feb. 1855, 17 D. 821.

barked in the business.(i) In *Guthrie v. Fairweather*,(k) some doubts were expressed as to whether a factor, who had merely left the trust-money as he found it, in a business in which he was a partner, was liable for more than 5 per cent. interest; but it has since been decided by concurring judgments of both Divisions, that the beneficiary, although not liable as a partner, is entitled to profits, not only on the principle of constructive trust,(l) but as a penalty upon the trustee for diverting the trust-funds into an improper channel.(m)

1990. It appears, however, from the sequel of the case of *Laird v. Laird*,(n) that the trustee will not be liable to refund profits paid to other *partners* in the concern who are not trustees; for their relation to the beneficiary is merely that of debtor to creditor. Nor will *trustees* who do not participate in the business be held accountable for such profits as are due, unless they have been guilty of neglect in not calling their co-trustee to account; but they will be liable in the event of a loss.(o) “A trustee,” said Lord Colonsay,(p) “cannot justifiably embark the trust-funds in trade, even though he be not expressly prohibited by the trust-deed, and though he may intend the benefit to accrue to the beneficiaries. If, therefore, he does so—if he does what by law he was not entitled to do, and the funds are in consequence lost, he must bear the loss; but if there is any gain, the gain will belong, not to the trustee, but to the beneficiary whose funds were so employed. It cannot be doubted that he must replace them if lost, as his proceedings were unauthorised by law. I think it not less clear that he cannot make gain to himself by using, for his own behalf, the funds of the trust committed to his care. The law will even presume that the trustee intended that the profits should go to the beneficiary, rather than presume that he intended his own aggrandisement at the risk or expense of the beneficiary.” With regard to the liability of the co-trustees, not in the business, his Lordship observed, that though they had made no profits themselves, and were not in the circumstances liable for those which fell to the share of their colleague, they might be liable for letting funds lie at a risk, and would be bound to make up any loss thence arising, with interest.(q) And the opinion of Lord Deas was to the same effect.

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Trustee not liable to account for profits paid to co-partners;

but will be liable for all losses.

Co-trustees not in the business liable for losses.

(i) See *Cochrane v. Black*, 16 July 1857, 19 D. 1019.

(k) *Guthrie v. Fairweather*, 16 Dec. 1853, 16 D. 214.

(l) See chapter 49.

(m) *Laird v. Laird*, 26 June 1855, 17 D. 984; see 993; *Cochrane v. Black*, *supra*.

(n) *Laird v. Laird*, 28 May 1858, 20 D. 972.

(o) See also, on this point, *Graham v. Keble*, 10 Nov. 1813, 2 Dow, 17, 6 Pat. 616.

(p) 20 D. 980.

(q) 20 D. 982.

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Directors of companies not entitled to invest in shares of other companies.

Investments of a wasting nature ought not to be continued.

The funds or heritable security, the only legal investments at common law.

1991. It has been decided that the directors of an incorporated company cannot lawfully invest their funds in the purchase of shares in another company, not only because the powers of the directors are limited by the charter or act of incorporation, but also on the principle that the directors are trustees for the shareholders, who are entitled to trust to the security afforded by their appointment, that the funds will not be appropriated to other purposes than those contemplated in the constitution of the company.(*r*)

1992. In the administration of English trusts by the Court of Chancery, the rule has been laid down, that if a testator give the residue of his personal estate(*s*) or the interest of his property(*t*) to several persons in succession, and the subject of the bequest is of a "wasting" nature, as leaseholds, annuities, etc., it will be the duty of the trustees to realise, and thereafter to invest the proceeds in the funds, in order that the estate may assume a permanent form, and so be capable of succession. But the intention to convert, which is the foundation of the duty referred to, may be overcome by expressions indicating that the subject should be enjoyed specifically.(*u*) This branch of the law of conversion, in its application to interests of a fugitive character, does not appear to have occurred for consideration in any native case; but the principle of the English decisions is agreeable to equity, and would probably be adopted by our Courts.(*x*)

1993. The proper channel of investment for trust-money is either the stock of the consolidated fund, or first class heritable security.(*y*) If to a legacy is attached a direction to invest the amount in Government securities, the trustees will be bound to purchase a quantity of stock equal to what the legacy would have purchased at the death of the testator, notwithstanding that a change may have taken place in the value of the public securities before the trustees were in a position to make the investment.(*z*) By a

(*r*) *Balfour's Trs. v. Edinr. & Northern Raily. Co.*, 8 June 1848, 10 D. 1240; *Caledonian, etc., Raily. Co. v. Mags. of Helensburgh*, 19 June 1856, 2 Macq. 891. See p. 405, where an opinion to this effect is expressed by the Lord Chancellor.

(*s*) *Howe v. E. of Dartmouth*, 7 Ves. 137, and cases there cited; *Lichfield v. Baker*, 2 Beav. 481; *Crawley v. Crawley*, 7 Sim. 427; *Sutherland v. Cooke*, 1 Coll. 498; *Johnson v. Johnson*, 2 Coll. 441.

(*t*) *Fearn v. Young*, 9 Ves. 549; *Benn v. Dixon*, 10 Sim. 636; *House v. Way*, 12 Jur. 959; *Oakes v. Strachey*, 13 Sim. 414.

(*u*) *Vincent v. Newcombe*, Younge, 599;

Lord v. Godfrey, 4 Mad. 455. See Lewin on Trusts, 5th ed. p. 244.

(*x*) The doctrine, however, would not be extended to wasting interests in land; see *Muirhead v. Young's Trs.*, 13 Feb. 1858, 20 D. 592.

(*y*) Pet. *Haldane*, 28 Dec. 1848, 11 D. 286; Pet. *Lindsay*, *id. pag.*; *Accountant of Court v. Geddes*, 29 June 1858, 20 D. 1174.

(*z*) *Horsburgh v. Horsburgh*, 1 March 1848, 10 D. 824; see *Pollexfen v. Stuart*, 14 July 1841, 8 D. 1215; Pet. *Governors of Cauvin's Hospital*, 29 Jan. 1842, 4 D. 557.

recent Act of Parliament, Government Securities of every description, as well as other stocks of a *quasi* public nature, are declared eligible investments. (a)

1994. The provisions of this Statute (b) do not materially alter the common law obligations of trustees in relation to the investment of trust-money. The clause is as follows:—"Trustees under any trust-deed may, unless the contrary be expressly provided in such trust-deed, invest the trust-funds in the purchase of any of the Government Stocks, public funds, or securities of the United Kingdom, or stock of the Bank of England, or may lend the trust-funds on the security of any of the aforesaid stocks or funds or on the security of heritable property in Scotland, and may from time to time at their discretion vary any such investment or loan: Provided that the trustees shall not be held to be subject as defendants or respondents to the jurisdiction of any of Her Majesty's Superior Courts of Law or Equity in England or Ireland, either as trustees or personally, by reason of their having invested or lent trust-funds as aforesaid." And by section 6, "the powers of investment conferred by this Act shall not be held or construed as restricting or controlling any powers of investment of trust-funds expressly contained in any trust-deed."

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Rule of the Court of Chancery.

Powers of trustees under the Trusts Act, with respect to investments.

Powers of investment in trust-deeds not to be restricted.

1995. With regard to investments on heritable security, it is to be observed, in the first place, that trustees will be bound by any limitation imposed by the terms of the trust. And therefore, where trustees were directed "to lay out a sufficient sum on good security," for the purpose of providing a life annuity of £40 a year to the testator's widow, the capital to go to the children, it was held that the widow was not bound to accept a bond of annuity heritably secured, but was entitled to insist that a capital sum yielding £40 of annual interest should be set apart for her benefit. (c)

Trustees may conform to special directions as to investment contained in the trust-deed.

1996. House property, according to Lord St Leonards, is not a satisfactory investment; because it is liable to depreciation and to destruction by fire. (d) His Lordship's remark was made, possibly in forgetfulness of, certainly without direct reference to, the rule respecting investments which distinguishes the Scotch law from that of England; namely, that heritable security is the authorised channel for the investment of trust-money. In practice, trustees will be advised that they may lend upon the security of first class urban subjects with perfect safety and propriety.

Investment on the security of house property.

(a) As to the powers of English Trustees in relation to investments, see 22 & 23 Vict., cap. 85, § 82.

also disapproved of securing annuities by way of purchase; *Fitzgerald v. Pringle*, 2 Moll. 534.

(b) 30 & 31 Vict., cap. 97, § 5.

(d) *Per* Lord St Leonards in *Thomson v.*

(c) *Wilson v. Beveridge*, 31 Jan. 1833, 11 Sh. 843. The Courts of Equity have

Christie, 1 Macq. 238; *Train v. Bell's Trs.*, 26 May 1824, 3 Sh. 68, N.E. 44.

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Investments on postponed heritable securities.

1997. Trustees ought not to invest on postponed heritable securities. It has indeed been held that the existence of a preferable bond over the property is not of itself sufficient to fasten personal liability upon the investing trustee, especially where collateral security is taken. (e) However, in the case of the *Accountant of Court v. Forsyth*, (f) a *curator bonis* was obliged to refund a sum of £2000, which was lost in consequence of having been lent on a postponed bond and disposition in security, although he had taken the precaution of obtaining a valuation from a respectable builder, who certified that the property was worth upwards of £6,600, leaving a margin of £2,300, after deducting incumbrances, being more than a third of the estimated value. The Court seem to have proceeded upon the view that the factor ought to have known that the valuation was for a fancy price, as the property consisted chiefly of a villa and pleasure-grounds, and could not be turned to profitable account. We have already had occasion to observe, and now repeat, that it is not enough for the trustees to give directions for the suitable investment of the trust-funds. It is their duty to see that the money is actually invested. (g)

Duties of trustees for execution appointed in marriage-contract.

1998. It is a frequent provision in antenuptial marriage-contracts and family settlements intended to take effect *inter vivos*, that the trustees therein appointed shall be entitled to enforce the obligations of the parties by execution. The duties of trustees for execution are of a very delicate nature; and the Court will not exact the same degree of diligence from trustees who are merely charged with a general protection of the interests created by marriage settlements, that would be necessary and incumbent upon the trustees in relation to the management of property of which they are actually let into the possession. (h) The cases of *Stark*, (i) and *Muir v. Mackersy*, (k) may be consulted on the subject of the obligations of trustees for execution. In the latter case, a policy of insurance had been effected, in pursuance of an obligation to that effect in the antenuptial contract of the insurer, but was surrendered in consequence of the marriage having been dissolved without

(e) *Graham v. Hunter's Trs.*, 4 March 1881, 9 Sh. 543. But see *contra*, *Thomson v. Christie*, *supra*.

(f) *Account. of Court v. Forsyth*, 28 Jan. 1853, 15 D. 345; see *Murray v. Murray*, 30 May 1833, 11 Sh. 663.

(g) *Mayne v. M'Keand*, 4 June 1885, 13 Sh. 870; *Grieve v. Amos' Exrs.*, 24 June 1885, 13 Sh. 973; *Blain v. Paterson*, 28 Jan. 1836, 14 Sh. 361.

(h) In *Ross v. Allan's Trs.*, 18 Nov. 1850, 13 D. 44, marriage-contract trustees were found liable to the wife in repayment of funds which they had improperly advanced to the husband; see *Osburn v. Osburn*, 1714, M. 16,195.

(i) *Stark v. Moncreiff*, 7 June 1838, 16 Sh. 1114; *Hamilton v. Bruce's Trs.*, 20 May 1857, 19 D. 745.

(k) *Muir v. Mackersy*, 21 Dec. 1853, 16 D. 289.

issue surviving. The trustee thereupon charged the holder, a lady, to take out a new policy, but the Court did not give much encouragement to this proceeding, and allowed the note of suspension to pass without caution or consignation. CHAPTER LXIII.

1999. If trustees are expressly authorised to invest on personal security, it has been said that they may lend on personal bond, and will not be liable for the insolvency of the debtor, if he were believed to be of good credit at the time of entering into the transaction.^(m) We doubt the soundness of this opinion. Personal security, we think, means the security of personal property; and not that of a personal obligation, as a bond or a bill.⁽ⁿ⁾ It would seem that trustees empowered to lend on personal security are not liable for loss upon a postponed heritable bond, fortified by a collateral security in the shape of a policy of insurance.^(o) But they may not lend on the life interest of an heir of entail similarly secured.^(p) Pending the issue of a litigation as to the disposal of trust-property, trustees are not necessarily bound to invest it; nor will they be liable in penal interest for neglecting to do so, if they have acted in good faith.^(q)

Import and effect of an express authority to trustees to invest on personal security.

Investment *pendente lite*.

2000. It would seem that a legacy to minor children, when no provision is made for a continuing trust, may be paid over to the father as administrator-in-law; but if the trustees have reason to believe that he is in embarrassed circumstances, they ought to exact caution. Where this precaution was taken, the Court refused to enforce a claim for repetition at the instance of the minor beneficiary.^(r) If, on the other hand, the trustees are required to invest the sum, for behoof of one party in liferent and another in fee, in terms which vest an immediate interest in the beneficiaries, they sufficiently discharge their duty by investing the fund on good heritable security in the name of the parties for their respective interests, and are not bound to become parties to any inquiry as to the subsequent disposal of the fund.^(s)

Money bequeathed to a minor may be paid to curator or administrator-in-law.

2001. With regard to the measure of damages for insecure in-

Measure of damages for loss resulting from the improper investment of trust-funds.

^(m) *Per* Lord Moncreiff in *Seton v. Dawson*, 4 D. 828.

⁽ⁿ⁾ *Boss v. Allan's Trs.*, *supra*; *Langston v. Ollivant*, G. Coop. 83; *Boss v. Godsall*, 1 Y. & C. Ch. Cas. 617.

^(o) *Graham v. Hunter's Trs.*, 4 Mar. 1831, 9 Sh. 543.

^(p) *Bon-Accord Ins. Co. v. Souter's Trs.*, 11 Dec. 1850, 13 D. 295.

^(q) *Fortune's Trs. v. Gillies*, 16 Nov. 1839, 2 D. 59; *Douglas v. Douglas' Trs.*, 7 June 1867, 5 Macph. 827.

^(r) *Stevenson's Trs. v. Dumbreck*, 11 Feb. 1861, 4 Macq. 86, affirming 19 D. 462; *Govan v. Richardson*, 1638, M. 16,268; and see *Wilkie*, 1688, M. 16,811; *Graham v. Duff*, 1794, M. 16,388; *Johnstone v. Wilson*, 11 July 1822, 1 Sh. 558, N. E. 510. But trustees of a continuing trust are not bound to pay to a guardian; *Moncrieff v. Usher*, 15 Nov. 1861, 24 D. 49.

^(s) *Graham v. Kilgour*, 5 March 1829, 7 Sh. 543.

CHAPTER LXIII. vestments resulting in total loss, the rule in England is, that *cestuis que trust* may elect to charge the trustees with the amount of the money, or with the amount of Three per Cent. Consols which they might have purchased with the money, unless where they have been authorised to invest either in government or *real securities*, in which case the trustees are answerable only for the principal money and interest.^(t) And it was decided in a Scotch case, involving property to a considerable amount, that trustees were liable, in consequence of refusing to invest in the funds upon the requisition of all the beneficiaries, to pay a sum equal to what would have been gained in consequence of the rise of stocks in the interval.^(u) And on the same principle, where a trustee had been directed to secure a legacy of £500 by investment in American stocks, and the money was lost in consequence of the trustee having allowed the money to remain in the hands of the factor, who died insolvent, the Court found that the trustee was bound to purchase such sum of American stock as might have been purchased for £500 sterling within a reasonable time after the death of the testatrix; and also to pay to the pursuer a sum equal to the interests or dividend that would have accrued in time past upon the stock, in case the same had been duly purchased.^(x) But the value of the fund itself, with the addition of legal interest, has been more usually taken as the measure of damages.^(y)

Construction of discretionary powers in relation to investments.

2002. In many settlements the powers of investment are very inaccurately expressed. In practice, it is not unusual to find a general discretionary power given to trustees; or a power to invest on heritable security, and "on such other securities as the trustees shall think proper;" the intention being obviously to extend the powers of the trustees in the matter of investment. It is, however, very doubtful whether the words we have quoted are capable of receiving such a construction. We incline to think that a general reference of the duty of investment to the trustees' discretion, must mean a discretion to be exercised according to the rules of law; and that securities which the trustees shall think proper must be restricted to the class of securities which the Court would approve; that is, to investments in the funds or on heritable security.^(z)

(t) *Robinson v. Robinson*, 1 De G. M. & G. 256; *Lewin on Trusts*, 5th ed. 271.

(u) *Morrison v. Miller*, 9 Feb. 1827, 5 Sh. 822, N. E. 299.

(x) *Sym v. Charles*, 18 May 1880, 8 Sh. 741, 748.

(y) *Pollexfen v. Stewart*, 14 July 1841, 8 D. 1215, 1284; *Seton v. Dawson*, 18 Dec.

1841, 4 D. 818; *Anderson v. Small*, 12 Feb. 1888, 11 Sh. 382; *Blain v. Paterson*, 28 Jan. 1886, 14 Sh. 361, 374; *Wellwood v. Ross*, 28 June 1881, 9 Sh. 790; *Gray v. Gray*, 4 June 1885, 13 Sh. 866.

(z) See *Stiles v. Guy*, narrated *supra*, § 1960, note.

To warrant the investment of the trust-funds on securities of a different character, the authority must, in our opinion, be *express*. CHAPTER LXIII.

2003. In practice, it is desirable to insert in settlements of personal property a power to invest in the purchase of guaranteed shares in incorporated companies, or to lend to such companies upon debenture, or to lend upon the security of guaranteed shares. Such securities, if judiciously selected, are safe investments, as is proved by the low rate of interest which they bear ; they are more easily obtained than securities over landed estate, and generally more easily realised. In the case of trusts intended to endure for a considerable time, a power to purchase property ought also to be given. Where the trustees have the confidence of the truster, it is desirable to make their powers as to investment very ample. Suggestions as to powers of investment.

CHAPTER LXIV.

ADMINISTRATION OF TRUSTS FOR SALE.

- I. *Execution of Trusts for Sale.*

II. *Power of Trustee to grant Titles and to discharge Purchasers.*
- III. *Of Purchases of the Trust-Estate by the Trustee.*

SECTION I.

EXECUTION OF TRUSTS FOR SALE.

Constitution of powers of sale.

2004. The subject of the constitution of powers of sale is discussed in a previous chapter.(a) These, when intended for the benefit of the donee of the power, *e.g.*, in the case of powers of sale in heritable securities, must be constituted by express grant. But in the case of a disposition in trust, a power of sale may be raised by implication, on the principle that all powers necessary for the due accomplishment of the purposes of the trust are comprehended in the conveyance.

Power not requisite for the sale of moveable or personal estate.

2005. As to sales of moveable property under trusts, it does not appear to be necessary that any express power should be granted, the trustee being entitled to sell by private bargain, at his own discretion, for the purpose of investing the property of the trust upon suitable security. The disposal of moveable property under trust, even when brought under judicial management, is very much a matter of discretion, the direction of the Act of Sederunt 1730 (b) being, that the factor shall “manage or dispose of such moveables according to the rules of law, and as prudence requires, for the benefit of the proprietor and all having interest.”(c)

Discretionary trusts for sale; whether such trusts may be exercised by a factor.

2006. The Court, it is conceived, would not now entertain a petition at the instance of trustees for authority to sell, though,

(a) Chapter 59 (Powers of Trustees).

(b) Act of S. 18 Feb. 1730, Alex. ed. p. 61.

(c) See *A. B.*, 21 Dec. 1848, 21 Jur. 78;

Dalglish, 18 Feb. 1849, 11 D. 1030; *Pet. Lindsay*, 10 March 1849, 11 D. 1030. As to the authority of creditors, see *Wood v. Anstruther*, 6 D. 291, 4 D. 1868.

where a doubt exists as to whether such a power has been given CHAPTER LXIV. by the settlor, it might be cleared in a declarator. (d) Judicial factors upon trust-estates are not entitled to exercise powers of sale of heritable property at their own discretion, but authority is always granted on special application, where the realisation of the property is necessary for the execution of the purposes of the trust, (e) or where it is necessary to save the estate from injury by diligence, (f) or otherwise. (g) For the better protection of the beneficiary's interest, the rule has been laid down, that sales of heritage under the authority of the Court must be by public roup. (h) Curators, or guardians for minors, or persons under legal incapacity, will not be authorised to sell heritable estate, unless the sale is considered necessary for the purpose of providing for immediate maintenance, (i) or to protect the estate from being carried off by diligence, (k) or for the fulfilment of existing contracts. (l)

2007. Bankruptcy (m) or sequestration (n) does not extinguish the powers of sale of heritable creditors; but if the heritable creditors defer the execution of such powers, the general creditors may, at a meeting called for the purpose, resolve that the trustee shall dispose of the heritable estate by public sale, or bring it to a judicial sale; the upset price and the conditions of roup, in the former alternative, being determinable by the trustee, with the consent of the commissioners; or the trustee may, with concurrence of a majority of creditors in number and value, and of the heritable creditors, if any, and of the accountant, sell the estate by private bargain, on such terms as may be fixed, with concurrence of those parties. (o) The institution of a ranking and sale, (p) or of a multiplepoinding, does not operate as an interruption to a sale by a heritable creditor under a power; but it would seem that liti-

Exercise of powers of sale given to heritable creditors.

(d) See the analogous case of *Kinloch*, 7 Dec. 1859, 22 D. 174.

(e) See *Pet. Auld*, 5 Feb. 1856, 18 D. 487.

(f) *Fullarton*, 19 June 1884, 12 Sh. 750; *Ferguson*, 14 Jan. 1886, 14 Sh. 218; *Cleugh*, 17 July 1841, 8 D. 1261; *Arthur*, 30 June 1846, 8 D. 948.

(g) *Muller v. Dixon*, 11 Feb. 1854, 16 D. 586.

(h) Cases of *Auld* and *Arthur*, *supra*.

(i) *Innes*, 17 July 1846, 8 D. 1211; *Howe*, 12 Feb. 1859, 21 D. 486; *Lindsay*, 17 Feb. 1857, 19 D. 455.

(k) *Pet. Dunbar*, 7 July 1847, 9 D. 1426; *Wood*, 16 March 1856, 18 D. 732; and see the older cases of *Vere*, 1804, M. 16,889; *Finlayson*, 22 Dec. 1810, F.C.

(l) *Crichton*, 18 Feb. 1857, 19 D. 429; *Hawkins*, 24 June 1848, 10 D. 1408; *Kirkland*, 6 June 1848, 10 D. 1282; *Alexander*, 26 June 1857, 19 D. 888.

(m) *Dunlop v. Marshall*, 19 Jan. 1821, Hume, 666, F.C.

(n) 19 & 20 Vict., c. 79, §§ 112 and 113.

(o) 19 & 20 Vict., c. 79, §§ 114 and 115. See *Beveridge v. Wilson*, 17 Jan. 1829, 7 Sh. 279; *Kerr v. Wood*, 8 March 1830, 8 Sh. 628; *Melville v. Paterson*, 1 June 1842, 4 D. 1811.

(p) *Simson v. Graham*, 25 Nov. 1831, 10 Sh. 66; *Bell v. Gordon*, 24 Feb. 1838, 16 Sh. 657; *Robertson v. Ferrier*, 12 Dec. 1838, 12 Sh. 208.

CHAPTER LXIV. giosity is a sufficient ground for interpellating a trustee vested with a discretionary power from putting it in force; for, *pendente lite nihil innovandum.*(*q*)

Sales of heritable estates under the Entail Amendment Act.

2008. Sales of entailed property charged with debt, under the powers conferred by the 25th section of the 11 and 12 Vict., cap. 36, (*r*) must be carried through at the sight of the Court of Session, who are empowered to select such portions of the estate, other than the mansion-house, offices, and policies, as they may consider most suitable to be sold for the purpose of paying off the debt, and to settle the terms of the conveyance and the price; it being declared that the purchaser shall have no interest, concern, or responsibility as to the application thereof. It has been held that the powers of sale given by the Entail Amendment Act are applicable to the case of an entailed estate charged with debt under the authority of a private Act of Parliament containing provisions for clearing off the debt by instalments. (*s*)

Trustees entitled to judge as to the necessity for executing a power of sale.

2009. It is impossible to lay down any rule as to the circumstances in which trustees will be justified in executing a discretionary power of sale; nor is it necessary to do so, since trustees holding a discretionary power are themselves the judges of the necessity of using it; and they will be protected in the exercise of their discretion if they act in good faith. (*t*) It would seem that a power of sale may be exercised by a majority of the trustees, and does not require the consent of the entire body. (*u*) And where one of two trustees, under a voluntary trust-deed for payment of creditors, had attended the sale and made an offer for the property, which was not accepted, he was held barred from pleading, in an action against his co-trustee, that the sale had been invalidated in consequence of

(*q*) See *Ersk.* 2, 12, 65; *Cheyne v. Cameron's Trs.*, 19 Jan. 1881, 9 Sh. 802.

(*r*) Also 88 Geo. III., c. 60; as to which see *Laurie v. Laurie*, M. "Public Burden," App. No. 2, 2 Dow, 556; *Malcolm v. Malcolm*, 4 Dec. 1821, 1 Sh. 188, N. E. 174; *Baird v. Neill*, 12 June 1835, 18 Sh. 927.

(*s*) *Mackenzie v. Mackenzie*, 7 June 1849, 11 D. 1115; see *Meiklam v. Glassford*, 4 Dec. 1851, 14 D. 187.

(*t*) *Clelland v. Brodie*, 20 Nov. 1844, 7 D. 147; *Mitchell v. Mackinlay*, 9 Feb. 1842, 4 D. 634. When the power is *discretionary*, the purchaser cannot challenge the trustee's title. Thus, in a deed of trust for payment of debts, it was declared, that if for any reason whatever, in the opinion of the trustees, a sale should become necessary, they were authorised to sell. The

purchaser objected that the amount of the incumbrances would not justify a sale of the entire estate; but the Vice-Chancellor Shadwell said,—“The general language of the testator has made it plain that the power of sale depends upon the opinion of the trustees that a sale is necessary; and the fact that they did think it necessary will be proved by their executing the conveyance to the purchaser; *Rendlesham v. Meux*, 14 Sim. 249, 257.

(*u*) *Fleming v. Campbell*, 25 June 1845, 7 D. 985; *Darling v. Adamson*, 24 Feb. 1887, 15 Sh. 672; but see *contra*, *Scott v. Reid*, 16 Feb. 1822, 1 Sh. 332, N. E. 308. A power of sale may be exercised by *surviving* trustees both at common law and under the Trustee Act 1861 (chapter 54, section 2).

his having refused to interpose his consent to the transaction.(x) CHAPTER LXIV.
 Trustees may grant a commission to a factor to carry through a sale, with power to convey; and the purchaser cannot object to this as a delegation, for the mandate is itself an execution of the trust.(y) Where the factor has power to sell, but not to dispo-
 ne, the trustees will be bound to grant a title or to pay damages.(z) Trustees expressly enjoined to sell must proceed with reasonable despatch, and not hang up the trust by bringing actions to ascertain the sufficiency of their title to the property.(a)

Trust for sale
may be executed
through a factor.

2010. In trusts to sell for behoof of creditors, the consent of the granter is sufficiently given by his subscription of the trust-deed; and he will not be permitted to control the discretion of the trustee as to the terms of the sale,(b) still less to stop the proceedings by intimating his intention to recall the trust, and to make other arrangements for payment.(c) The beneficiary, as a rule, cannot stop the execution of a power;(d) nor can a non-acceding creditor, who has neither attached the estate nor interpellated the trustees by diligence, prevent the trustee of the acceding creditors from putting the heritable estate up to auction.(e) But any abuse of powers of sale by trustees or creditors may be restrained by the Court.(f) On this principle, interdict has been granted to prevent an unnecessary sale of lands, where the property already disposed of had realised a sufficient sum to pay all debts;(g) and, in another case, to prevent a sale being carried through by a preferable creditor at an insufficient upset price, to the injury of postponed creditors.(h)

Beneficiary not
entitled to in-
terfere.

2011. In the powers of sale granted in heritable securities, it was usual to stipulate that the sale should be by public roup; and this condition has been made matter of style by the Heritable Securities Act 1847,(i) which declares that a simple power of sale shall

Sales at the
instance of cre-
ditors must be
by public roup.

(x) *Brisbane's Trs. v. Crawford*, 8 Feb. 1826, 4 Sh. 422, N. E. 427.

(y) *Innes v. Reid's Trs.*, 22 June 1822, 1 Sh. 518, N. E. 479; contrary to the English rule; see Lewin, 5th ed. p. 822.

(z) *Thomas v. Walker's Trs.*, 4 July 1829, 7 Sh. 828; 4 Dec. 1832, 11 Sh. 162.

(a) *Darling v. Adamson*, 24 Feb. 1847, 15 Sh. 672; *Scott v. Thomson*, 6 Dec. 1854, 17 D. 124; *Ogilvie's Leg. v. Hamilton*, 10 Dec. 1838, 12 Sh. 189.

(b) *Calder v. Gray*, 16 Dec. 1828, 2 Sh. 582, N. E. 500.

(c) *Innes v. Innes*, 18 Dec. 1828, 7 Sh. 206.

(d) *Kelly v. Thomson*, 19 Dec. 1840, F.C.

(e) *Stubbs & Co. v. Smith*, 24 June 1829, 7 Sh. 790; *Kerr v. Graham's Trs.*, 17 Nov. 1827, 6 Sh. 73; 21 Dec. 1827, 6 Sh. 270.

(f) *Ross v. Equitable Loan Co.*, 28 Dec. 1826, 5 Sh. 192, N. E. 178; *Moffat v. Calderhead*, 16 June 1825, 4 Sh. 96, N. E. 98; *M'Dowal v. Milligan*, 17 Nov. 1825, 4 Sh. 182, N. E. 184.

(g) *Pender v. Ferguson*, 17 Nov. 1831, 10 Sh. 19. See *Ord v. Noel*, 5 Mad. 440, and cases noted in Lewin on Trusts, 5th ed. p. 812.

(h) *Kerr v. M'Arthur's Trs.*, 23 Dec. 1848, 11 D. 301; but see *Clelland v. Brodie*, *supra*.

(i) 10 & 11 Vict., cap. 50, § 8.

CHAPTER LXIV. have the same effect and operation as a special provision, to the effect that, on failure to repay the principal and interest within three months after a requisition, (k) it should be lawful to the grantee to sell and dispose of the lands, in whole or in lots, by public roup at Edinburgh or Glasgow, or at the head burgh of the county, etc., on previous advertisement, stating the time and place of sale, and published once weekly for at least six weeks previous to the expiry of the said three months, etc. Apart from convention, the creditor is bound to give his debtor an opportunity of paying before advertising the property. (l) On the construction of a private Act of Parliament, which authorised the sale of certain entailed lands under the usual conditions as to advertisements, etc., it was held that an adjournment for nine months, followed by a reduction in the upset price, must be regarded as a new exposure, requiring to be preceded by the same statutory advertisements as the first exposure. It was observed that the intervention of one of the legal terms of payment between the diets was enough to interrupt the proceedings. (m) It would seem that a trustee who should proceed to sell without proper publication, might be interpellated by interdict at the instance of the beneficiary. (n)

Valuation and
upset price.

2012. In sales of property under the authority of the Court, it is customary to fix the upset price upon a report by two valuers. Trustees would do well to follow the same course, and not to assume the responsibility of determining the price upon their own opinion of the value of the property. When it is remembered that by the law of Scotland the first party subscribing an offer for the upset price is entitled to a disposition of the estate, in the absence of any higher offerer, it will at once be seen that the determination of the upset price of property is a duty requiring the greatest circumspection. (o) Trustees may be restrained by the Court of Session from carrying through a sale at a season when purchasers are not likely to come forward, or at such an upset price as involves a sacrifice of

(k) *Morison v. Miller*, 18 June 1818, Hume, 720.

(l) *Moffat v. Calderhead*, *supra*; *Hagart v. Robertson*, 20 Dec. 1834, 18 Sh. 284; *Reid v. Steele*, 21 Feb. 1852, 24 Jur. 266.

(m) Pet. *Melville and Dundas*, 27 Jan. 1854, 16 D. 419; and see *M'Gregor v. Stirling*, 28 Nov. 1832, 11 Sh. 138; *Hope v. Moncrieff's Tutor*, 26 Jan. 1833, 11 Sh. 324, and *Nisbet v. Cairns*, 12 March 1864, 2 Macph. 868. But it is not incumbent on the exposor to give a new intimation to the debtor; *Glas v. Stewart*, 29 May 1830,

8 Sh. 843; *Young v. Dunn*, 1785, M. 14,191.

(n) See cases cited *supra*, § 2010. The Court of Chancery gives relief either by setting aside the sale, or by injunction to restrain trustees from selling upon insufficient notice; Anon. case, 6 Mad. 10; *Blennerhasset v. Day*, 2 Ball. & B. 183; *Jenkins v. Jones*, 2 Giff. 99, 29 L. J. Ch. 493; but see *contra*, *Matthie v. Edwards*, 16 L. J. Ch. 405.

(o) See Sugd. Vend. and Purch., 11th ed. 55.

the rights of postponed creditors ;(p) who are entitled, if necessary for the protection of their interests, to tender payment of the preferable debt, and to demand an assignation to the security on payment of the debt so secured.(q) CHAPTER LXIV.

2013. It is not unusual in articles of roup of heritable estate to stipulate that the purchaser must refer questions as to the sufficiency of the title to arbitration ;(r) or that he is to satisfy himself as to the validity of the title before the sale,(s)—a stipulation which is absolutely necessary for the protection of trustees who may have no funds out of which to defray the expense of litigation, other than the price of the estate itself. A creditor was held not entitled to insist that the title-deeds should be produced at the sale, where this could not be done without discharging a lien.(t) On the other hand, if the exposor wishes to have the titles, he must discharge any security to which they are subject at his own expense.(u) Stipulations as to title.

2014. The sale must be conducted fairly. If the upset price has been honestly and intelligently fixed, the trustee has no excuse for buying in, and if he do, he exposes himself to an action of damages at the instance of any *bona fide* offerer ; and also at the instance of the beneficiary, in the event of the estate being afterwards sold for less than the price at which it was withdrawn.(x) A *bona fide* offerer of the upset price is entitled to reduction of all offers made by disqualified persons, or in the interest of the exposor, subsequent to his own first offer ; and he may demand a conveyance in terms of it ;(y) though he is not himself bound, being liberated in consequence of the fraud practised upon him.(z) When the time of How the sale is to be carried through.

(p) 2 Bell's Com. 5th ed. 292; *per* Lord Mackenzie in *Kerr v. M'Arthur's Trs.*, 23 Dec. 1848, 11 D. 802; and see *Wilson v. Stirling*, 14 March 1848, 8 D. 1261.

(q) *Cunninghame's Trs. v. Hutton*, 18 Dec. 1847, 10 D. 307.

(r) *Stewart v. Lang's Trs.*, 30 Nov. 1839, 2 D. 168; *Anderson v. Shaw*, 6 March 1849, 11 D. 970.

(s) See *Young v. Grierson*, 19 July 1849, 11 D. 1482.

(t) *Grant v. Findlay*, 10 July 1845, 4 Bell, 361. But see *Clason v. Jones*, 17 July 1847, 9 D. 1512.

(u) *Dobie y. Scales*, 19 May 1831, 9 Sh. 609; *Malcolm v. Carmichael*, 9 March 1854, 16 D. 825.

(x) *Taylor v. Tabrum*, 6 Sim. 281. Sir John Leach remarked, in *Ord v. Noel*, 5 Mad. 440, that if a sale were made with the circumstances of caution which a pro-

vident owner would have applied in the case of his own property, it could not be a breach of trust that the estate did not produce a full price; for the very nature of an auction was, that the adequacy of price should be submitted to the chance of competition. But he added, "If trustees, or those who act by their authority, fail in reasonable diligence—if they contract under circumstances of haste and improvidence—if they make the sale with a view to advance the particular purposes of one party interested in the execution of the trust, at the expense of another party, a court of equity will not enforce the specific performance of the contract."

(y) *Faulds v. Corbett*, 25 Feb. 1859, 21 D. 587; *Grey v. Stewart*, 1753, M. 9560.

(z) *Anderson v. Stewart*, 16 Dec. 1814, F.C.

CHAPTER LXIV. exposure is limited, as was formerly the practice, by the running of a half-hour sand-glass, it is "the duty of the judge of the roup, by laying the sand-glass on its side, or making it run backwards, to prevent it from running out so long as there appear offerers bidding against each other." (b) Except at judicial sales, the practice now is, to knock down the property to the highest offerer, after three fair calls by the judge of the roup: no time is limited.

Settlement of
the price.

2015. The usual terms of purchase are, that the purchaser shall deposit, or, in the option of the exposers, grant bond for, the price of the subjects within ten days, under a penalty of *one-fifth* part of the price in case of default, which covers the loss from a resale, or from the acceptance of the next lowest offer. (c) Previous offerers are bound by their subscriptions during such period after the sale as may be stipulated in the articles of roup; (d) but the exposers are entitled, on failure of the last offerer, to expose the subjects of new.

Re-exposure.

It is optional to trustees either to resell the estate, in the event of the successful bidder failing to grant bond for the price in terms of his offer, or to fall back upon a previous offer. (e) Lord St Leonards observed, in reference to a case where there had been two previous obligatory offers, that no trustee would resort to a resale in such circumstances. (f) But if the trustee will neither enforce the existing obligations nor take steps for a resale, and in the meantime lies by till the property is deteriorated or falls in value, it would seem that he will be answerable for the damage actually resulting from such delay; (g) though it will not do to debit him with the price of the subjects. But if he adds to neglect the folly of conveying the property without requiring payment of the price from the purchaser, he will undoubtedly be liable as for the full value of the property, (h) the conveyance being an act of intromission. (i) An obligation to grant bond for the price is not implemented by consigning the money in bank in the joint names of the purchaser and the seller's agent; (k) obligations in security of the purchase money being subject to a strict construction. (l)

(b) *Per curiam* in *Pet. Burns*, 1807, M. "Sale," App. No. 4.

(c) *Thomson v. Dudgeon*, 4 June 1851, 18 D. 1029. The purchaser is not liable beyond the amount of the penalty; *Johnstone's Trs. v. Johnstone*, 19 Jan. 1819, F.C.

(d) See *Davidson v. Kerr*, 19 Jan. 1815, F.C.

(e) *Walker v. Gavin*, 1787, M. 14,193.

(f) *Thomson v. Christie*, 1 Macq. 240.

(g) *Allan v. Mansfield*, 24 Jan. 1884, 12 Sh. 829.

(h) *Thomson v. Christie*, 16 June 1852, 1 Macq. 286.

(i) 1 Macq. 242.

(k) *Rose*, 10 July 1885, 18 Sh. 1094; *Hunter v. Bowie*, 16 Jan. 1829, 7 Sh. 270.

(l) *Kennedy v. Ramsay's Trs.*, 22 June 1847, 9 D. 1838; *Menzies v. Barstow*, 4 July 1840, 2 D. 1817; *Dunmore v. Dickson*, 2 Dec. 1884, 13 Sh. 116; *Davidson v. Kerr*, 19 Jan. 1815, F.C.

2016. Trust-deeds very frequently empower the trustee to sell property either by public rroup or private bargain. However, if creditors have used inhibition before the date of the trust, the trustee cannot dispose of the property by extrajudicial sale, as the inhibitor would then acquire a preference.^(m) Nor would the accession of the inhibiting creditor obviate the objection, because such accession is presumed to be made under reservation of preferential rights. As a general rule, a trustee for creditors ought not to sell by private bargain; though, where there is a full accession of creditors, and the estate has been already exposed to auction without success, he will be justified in entertaining a private offer, subject to the approval of the creditors.

CHAPTER LXIV.

Whether a sale by private bargain may be prevented by inhibition.

2017. As to the powers of trustees under family settlements, it is laid down by Professor Bell, that where the direction is general, the trustees may use their discretion in selling either by auction or by private bargain;⁽ⁿ⁾ and, in practice, a general power has been held to be a sufficient authority to carry through a sale by private bargain. By Section 4 of the Trusts (Scotland) Act 1867,^(o) "All

General power is a sufficient authority to sell by private bargain.

Extension of powers of trustees for sale by the Trusts Act.

^(m) *M'Lure v. Baird*, 1807, M. "Competition," App. No. 3; *Monro v. Gordon's Crs.*, 1777, M. "Inhibition," App. No. 1.

because the mortgage gave authority to sell by private contract.

⁽ⁿ⁾ 1 Bell's Com. 5th ed. p. 88. As a question of *construction*, a general power is obviously a power to sell in the same manner as a prudent proprietor might have done. As regards settlements for the purposes of economical arrangement or disposal of succession, it is clear that the beneficiaries' interest is the same as that of the settlor—namely, to get the largest price for the estate. The trustees may therefore safely be left to use their discretion. But the interest of *creditors* under a trust for payment of debts being merely to realise their claims, the condition of a *public sale* seems a necessary precaution that the truster's reversionary interest may not be sacrificed to the convenience of creditors. Mr Lewin lays down (Trusts, 5th ed. p. 321) that the trustee has an option to sell either by public auction or private contract; but the cases cited (*viz.*, *ex parte Dunman*, 2 Rose, 66; *ex parte Harley*, 2 D. & C. 681; and *ex parte Ladbroke*, 1 Mont. & A. 884) relate to sales by assignees in bankruptcy, who are not bound by the conditions of the mortgage; while in the later case of *Davey v. Durrant*, 2 De G. & J. 506, 26 L. J. Ch. 881, a private sale by a mortgagee was sustained only

In *Ord v. Noel*, 5 Mad. 440, the Court set aside a sale for behoof of creditors on the ground that the reversionary interest had been sacrificed by forcing on the sale with undue precipitation. See Sir John Leach's opinion stated *supra*, § 2014, and Sugd. Vend. and Purch. 11th ed. p. 61.

In *Harper v. Hayes*, 2 Giff. 210, where, in a family settlement, trustees were empowered to sell the whole real estate, either together or in parcels, and either by public auction or private contract, and the trustee contracted to sell the estate, with the consent of all the *cestuis que trust* except the assignee of one share, for less than was offered by such assignee, the Vice-Chancellor Stuart set aside the sale, and deprived the trustee of the costs of the suit.

By 23 & 24 Vict., c. 145, § 1, English trustees invested by any will, deed, or other instrument of settlement, with a power to sell, either generally or in any particular event, are declared to be entitled to sell the estate, either in the whole or in lots, either at one time or at several times, and either by public auction or by private contract.

^(o) 30 & 31 Vict., c. 97.

CHAPTER LXIV. powers of sale conferred on trustees by the trust-deed, or by virtue of this Act, may be exercised either by public roup or private bargain, unless otherwise directed in the trust-deed, or in the authority given by the Court, or in the deed of consent to be granted by the beneficiaries; and when the estate is heritable, it shall be lawful in such sales to sell, subject to or under reservation of a feu-duty or ground-annual, at such rate and on such conditions as may be agreed upon; and in all sales and feus it shall be lawful to reserve the mines and minerals if so wished."

SECTION II.

POWER OF THE TRUSTEE TO GRANT TITLES. AND TO DISCHARGE PURCHASERS.

Trustees for sale are bound to make delivery and to grant titles.

2018. Trustees are of course bound by their contract with the purchaser to give him possession of the subject, and to grant such dispositions or other writs as may be necessary for the completion of his title.(p) As the duty of granting a title arises from obligation *ad factum præstandum*, it may be enforced by personal diligence against the trustee; and recourse may also be had to the remedy of suspension and interdict in the event of any attempt being made to deprive the purchaser of his rights by re-exposing the property, or otherwise.(q) Trustees for sale are also, like other vendors, bound to purge incumbrances affecting the estate.(r)

Warrandice to be granted by trustees.

2019. The proper warrandice to be granted by trustees to purchasers of heritable property was settled by the Court in the case of *Forbes' Trustees v. Mackintosh*, where it was found that the purchasers were entitled "to have a clause of warrandice inserted in the disposition directly binding the truster, his heirs and successors, in absolute warrandice, without reference to former trusts; and the trustees in warrandice from fact and deed."(s) This should be expressed in the articles of roup; not left to implication. Heritable creditors selling under a power may bind the debtor in absolute warrandice.(t) In either case, the purchaser for an adequate price may demand a good title; by which is meant a title that will secure him not only against eviction, but also against the risk of

(p) See *Mitchell v. Thomson's Trs*, 27 1880, 8 Sh. 927; *Robertson v. M'Gregor*, Nov. 1827, 6 Sh. 135; *Dick v. Donald*, 12 11 Dec. 1840, 8 D. 218.
Dec. 1826, 2 W. & S. 522.

(q) *Cheyne v. Cameron's Trs.*, 19 Jan. 1822, 1 Sh. 497, N.E. 462; *Kelly v. Macindoe*, 6 March 1858, 20 D. 778.

(t) 10 & 11 Vict., cap. 50, sect. 3. See

(r) *Ralston v. Farquharson*, 17 June *Russell v. Mudie*, 28 Nov. 1857, 20 D. 125.

trouble or expense in defending it.(u) Parties acquiring lands under compulsory powers of sale are entitled to warrandice, but cannot withhold payment on account of the badness of the title.(x) CHAPTER LXIV.

The capacity of trustees to discharge the price of trust-property sold by them involves two questions:—*First*, Is the sale challengeable in a question with a purchaser, as being *ultra vires*? and *secondly*, Is the sale, although within the powers of the trustees, reducible on the ground that they misapplied the price? Power to grant discharges.

2020. I. CAN A PURCHASER BE DEPRIVED OF THE ESTATE ON THE GROUND THAT THE TRUSTEES HAVE EXCEEDED THEIR AUTHORITY?—The purchaser of trust-estate ought to satisfy himself that the title of the trustees is such as he may safely accept. If it should afterwards appear that their title was defective, the purchaser is in no worse position than if he had bought on an *ex facie* good title from a proprietor in his own right. He has his recourse against the trustees;(y) or, if that be excluded by the terms of the warrandice, he may enforce his claim against the trust-estate, or against the beneficiaries amongst whom the proceeds of the sale have been divided.(z) In the next place, a purchaser from trustees must not only ascertain that they have a title, but also that they are clothed, either expressly or by implication, with a power of disposal of the subjects in question; and if he is led into an ineffectual purchase through neglect of this obvious precaution, it is but just that the loss should fall on him rather than upon beneficiaries who have taken no part in the transaction.(a) It would seem that a *bona fide* purchaser at a sale, under statutory powers, is exempt from liability to eviction on any objection to the proceedings not appearing *ex facie* of his title.(b) Purchaser ought to satisfy himself that trustees have a title and power to sell.

2021. The next question for the consideration of an intending Purchaser must ascertain whether power given absolutely or conditionally.

(u) *Dunlop v. Crawford*, 26 May 1849, 11 D. 1068; 25 Jan. 1850, 12 D. 518; *Hope v. Hamilton*, 1 July 1851, 18 D. 1268; *Waddell v. Pollock*, 19 June 1828, 6 Sh. 999; *Brown v. Cheyne*, 6 Dec. 1838, 12 Sh. 176. If, in a suit to enforce specific performance of a contract of sale, the Court of Chancery is of opinion that the objections to the trustee's title are bad (although in a popular sense it might be called a doubtful title), the Court will compel implement. "It is true," said Sir J. Romilly, M.-R., in *Wrigley v. Sykes*, 21 Beav. 387, 25 L. J. Ch. 458, "that this Court will not compel a purchaser to take a doubtful title; but if the Court is of opinion that the title at law is clear, and that the contract is clear, the Court is bound so to decide: it cannot speculate upon the question whether any other Court would come to an opposite or contrary conclusion;" 25 L. J. Ch. 460.

(z) See *Hamilton v. Bridges*, 28 Jan. 1832, 10 Sh. 262; *Higginbotham v. Clyde Trs.*, 27 June 1848, 5 D. 1267; *Miles v. North British Ry. Co.*, 16 Feb. 1867, 5 Macph. 402; *Thomson v. Id.*, p. 410.

(y) See *Thomas v. Walker's Trs.*, 4 Dec. 1882, 11 Sh. 162.

(z) *Bald v. Globe Insurance Co.*, 17 Dec. 1847, 10 D. 289.

(a) *Mags. of Airdrie v. Smith*, 18 July 1850, 12 D. 1222.

(b) *Hamilton v. Chancellor*, 18 Nov. 1838, 12 Sh. 22.

CHAPTER LXIV. purchaser is, whether the sale is matter of express direction in the trust-deed; or optional; or conditional upon the necessity that may arise of providing funds for the payment of the truster's debts. An express or implied direction to sell excludes the possibility of doubt as to the trustee's power; but a power depending upon circumstances is a more doubtful title, and imposes upon the purchaser the duty of inquiry as to the necessity for the sale. With regard to the extent to which the purchaser's title is liable to be affected by extrinsic circumstances—as to the nature of the inquiries which he is entitled to make, and the degree in which the estate will be bound by the statements of the trustee in answer to such inquiries—our reports, unfortunately, give little or no information. But a distinction has been recognised by English jurists which appears to be well founded, and will probably be ultimately found to afford a basis for the authoritative settlement of the questions here referred to. The distinction is this: if the settlor *direct* a sale for payment of debts in the event of a deficiency of personal estate, a *general* power of sale is held to be implied; the direction being supposed to be added for the guidance of the trustees, with reference to the circumstances in which they are to execute the power that is given to them by implication. As in this case there is no condition in the trustee's title, it is held that the purchaser, who has not the means of examining the trust-accounts, is not to suffer prejudice should it be proved eventually that the sale was unnecessary. The general opinion therefore is, that the purchaser is entitled to rely on the assurance of the trustee that a necessity for the sale has arisen. (c) But if the trustees have only a *power* of sale in the event of a deficiency of personal estate, then such power, when given *per expressum*, is held to be qualified by the condition annexed to it; and the purchaser must, at his peril, ascertain that circumstances have emerged to warrant the execution of the power. (d)

Purchaser not bound to inquire whether a necessity has arisen for a sale.

Unless the power is conditional on arising necessity.

Sale in excess of power.

2022. A purchaser is clearly not bound to ascertain whether the property offered to him is in excess of what will be sufficient to answer the purposes of the trust; for the validity of a sale cannot be supposed to depend upon the issue of an accounting. (e) However, if the trustees insist on selling in manifest excess of the required sum, they may be restrained in Scotland by interdict at the instance of the beneficiary, (f) and in England by injunction. (g)

(c) Lewin on Trusts, 5th ed. p. 880 *et seq.*; *Shaw v. Borrer*, 1 Keen, 559.

(d) *Culpepper v. Aston*, 2 Ch. Ca. 221; *Dike v. Ricks*, Cro. Car. 385; Lewin, *supra*.

(e) *Spalding v. Shalmer*, 1 Vern. 801.

(f) *Pender v. Ferguson*, 17 Nov. 1881, 10 Sh. 19.

(g) Lewin on Trusts, 5th ed. p. 822.

Where a power of sale is given for the purpose of enabling the trustee to pay off debts, it has been justly held, in the case of the execution of such a power long after the testator's death, that the lapse of time is a circumstance that ought to put the purchaser on his guard, and lead him to suspect the non-existence of liabilities; for it is unlikely, if there had been any, that the creditors would have allowed the sale to be deferred.^(h) But if the power is to raise funds for the payment of legacies or provisions payable at majority or marriage, the necessity of a sale does not arise until the arrival of the period of payment. In such cases, accordingly, postponement of the execution of a power is not necessarily a ground of suspicion, and would not be held to put the purchaser upon his inquiry.

2023. To obviate doubts or questions as to the competency of the exercise of powers of sale, it is not unusual, in the case of trusts for creditors, to take the title of the trustee in the form of a disposition qualified by a back-bond or declaration of trust. Until the title-deed is recorded for infestment, the property is safe from the diligence of adjudging creditors of the trustee, as they could only take *tantum et tale*; ^{Sales under *ex facie* absolute disposition qualified by latent trust.} ⁽ⁱ⁾ and although the estate might be carried off by a sequestration, yet, as the risk is slight where the trustee is a responsible person, it is desirable to take the conveyance in this form, for the sake of enabling the trustee to offer a title to purchasers which is entirely free from latent objections.^(k) Before granting a conveyance to the purchaser, the title of the trustee should be put upon record, which will have the effect of protecting the former from liability in respect of latent claims connected with the administration of the trust.

2024. It has been suggested that, in the case of a purchase from trustees possessing on a personal title, the taking of infestment on an open precept for infesting the trustees *in trust for uses and purposes*, and their assignees, might have a tendency to affect the purchaser's title with the conditions of the trust. But this view appears to be erroneous.^(l) Since the abolition of the precept of *sasine*, the question is no longer one of practical importance. As to purchases from heritable creditors vested with powers of sale, these ^{Effect of condition in purchaser's infestment.}

^(h) *Pierce v. Scott*, 1 Y. & C. Ex. Eq. 257.

⁽ⁱ⁾ *Macdowal v. Russell*, 6 Feb. 1824, 2 Sh. 682, N. E. 574; *Thomson v. Douglas, Heron & Co.*, 1786, M. 10,229; *Preston v. Dundonald's Cr.*, M. "Personal and Real," App. No. 2.

^(k) *Somerville's Trs. v. Redfearn*, 1 June 1813, 1 Dow. 50; 5 Pat. 707, reversing M.

"Personal and Real," No. 3; *M'Cubbin v. Ferguson*, 1715, M. 10,215; *Brugh v. Forbes*, 1715, M. 10,218; *Dewar v. Ross' Trs.* 1792, Bell's 8vo. Ca. 541; and other cases in M. voce "Personal and Real."

^(l) *Cockburn v. Cameron*, 4 June 1836, 14 Sh. 889; Bell's Pr. § 877.

Purchases from creditors selling under powers of sale.

CHAPTER LXIV. are safe from challenge if the bond is regular, and the requisites of the Heritable Securities Acts have been complied with. The purchaser is bound to ascertain that the usual intimation and advertisements have been made.

No authority
for holding pur-
chaser liable
when price
misapplied.

2025. II. ASSUMING THE SALE TO HAVE BEEN WITHIN THE POWERS OF THE TRUSTEE, IS THE PURCHASER BOUND TO SEE TO THE APPLICATION OF THE PRICE?—That words exempting trustees from the necessity of seeing to the application of the purchase-money have been adopted as a matter of usual style in trust-conveyances for sale, may be thought to argue some doubt as to the safety, under all circumstances, of purchasers paying to the trustee on his own receipt. But the fact that no precedent is to be found among the decisions of the Court of Session for fixing liability on a *bona fide* purchaser, in respect of misappropriation of the price(*m*)—when contrasted with the mass of decisions in England, (*n*) where the purchaser's liability depends upon the terms of the power of sale, seems sufficient to negative the supposition of any such liability existing under the law of this country. It is clear that unless the interests of the creditors or other beneficiaries are protected in the infetment taken upon the purchaser's title, the purchaser cannot incur responsibility to them on the footing that their interests affect the lands. (*o*) But it appears to us that it is only through the lands that the purchaser can be reached in a question with a beneficiary. Personally he is under no obligation, and has incurred no liability. If a settlor empowers his trustees to change the investments of his succession, in so doing he virtually disconnects the legal estate from the purposes of the trust, and we do not see how a purchaser can be liable to the beneficiaries in respect of the misapplication of the price of that estate. The price alone is available to the beneficiary as a security, and in the same degree as the land for which it forms the *surrogatum*. In those exceptional cases in which lands may be reclaimed from a *bona fide* purchaser (as where the purchaser has been deceived as to the nature of the title), he will be entitled to retain the profits received and consumed. (*p*)

Purchaser owes
no duty to the
beneficiary.

English autho-
rities.

2026. The principles upon which the Court of Chancery (*q*) has

(*m*) See, however, *Steven, Glen, & Currie, v. Fleming*, 19 Feb. 1811, F.C.

(*n*) See a summary of them, occupying thirty pages of Mr Lewin's Treatise, 5th ed. pp. 381–358.

(*o*) *Macdonald v. Place*, 24 Feb. 1821, Hume, 544; *Calder v. Stewart*, 18 Nov. 1806, Hume, 440; *Campbell v. Campbell*, 12 Feb. 1811, cited Hume, 444.

(*p*) *Cleghorn v. Elliott*, 10 June, 1842, 4 D. 1889; *Hamilton v. Chancellor*, 13 Nov. 1888, 12 Sh. 22; and M. Dict. *voce* “*Bona fide Consumption*.”

(*q*) If trustees are expressly empowered to give receipts, that relieves the purchaser from all concern with the application of the price; 1 W. & T. L. Ca. 8d ed. p. 56. The difficulty arises where there is no such

proceeded in determining the liability of purchasers, seem to be inconsistent with the theory of Scotch law as to the relation between trustee and beneficiary. To explain this it is only necessary to observe, that in the case of trusts created for payment of debts not specified, or for payment of debts and legacies, the rule, as laid down by Lord Lyndhurst in *Forbes v. Peacock*,^(r) and more precisely by Lord St Leonards in *Stroughill v. Anstey*,^(s) is, that the purchaser should in no case, in the absence of fraud, be bound to see to the application of the money raised; for the transaction is not to be hung up until all claims against the estate are settled. But in the case of a simple trust for sale to divide the proceeds between certain beneficiaries named in the deed, then, as there is no continuing trust, tending to interfere with the immediate payment of the money to the parties beneficially interested, it is held that the purchaser is charged with the duty of protecting their interests, and that they have a right, as equitable proprietors, to claim the

Purchasers only liable to see to application in the case of a trust for immediate distribution amongst parties named in the settlement.

authority. The leading case is *Elliot v. Merryman*, Barn. 78, 2 Atk. 4, where three propositions were laid down by the Hon. J. Verney, M.-R., which are admitted to be the basis of the English law on the subject. These are, (1) That a purchaser of *personalty* is not responsible for the misapplication of the purchase-money, except in cases of fraud; (2) that when *real estate* is devised to trustees upon trust to sell for *payment of debts generally*, the purchaser is not bound to see to the application of the price; (3) Where the trust is for payment of certain debts to debtors *mentioned specifically*, so that there is no necessity for postponing the distribution of the purchase-money, the purchaser is bound to see that it is rightly applied.

The 3d rule is *in viridi observantia*, and is applicable not only to trusts *inter vivos* for payment of specified or scheduled debts, but also to the case of a trust for payment of legacies or annuities, where (assuming that the personal estate is sufficient to meet the settlor's general liabilities) there is truly nothing more than a trust for immediate distribution; *Johnston v. Kennett*, 3 My. & K. 630; *Horn v. Horn*, 2 S. & S. 448.

The 2d rule was established in its generality (and so as to include trusts for payment of legacies) by *Stroughill v. Anstey*, as mentioned in the text. It is immaterial whether there is an express trust for sale or merely a charge upon the lands. This

was authoritatively settled by the decisions of Lord Langdale in *Shaw v. Borrer* 1 Keen, 559, and afterwards of Lord Cottenham in *Ball v. Harris*, 4 My. & Cr. 264.

The 1st rule is founded on the principle, that, as the executor is charged with the payment of the debts of the testator in a due course of administration, *personalty* cannot be immediately distributed; and, as already observed, the purchaser is not to be subjected to a contingent and uncertain liability; *Ewer v. Corbet*, 2 P. W. 148; *Andrew v. Wrigley*, 4 Br. C. C. 136; and the more recent cases of *Miles v. Darnford*, 2 De G. M. & G. 641, and *Haynes v. Forshaw*, 11 Hare, 93. "But personal estate may be clothed with such a particular trust, that it is possible the Court in some cases may require a purchaser of it to see the money rightly applied;" *per* the M.-R. in *Elliot v. Merryman*, *supra*.

(r) *Forbes v. Peacock*, 1 Phil. 717.

(s) *Stroughill v. Anstey*, 1 De G. M. & G. 653, confirming *Page v. Adam*, 4 Beav. 269, where Lord Langdale intimated an opinion that the distinction formerly taken between legacies and annuities was untenable. *Stroughill's* case is chiefly important from Lord St Leonard's emphatic repudiation of the doctrine that the Court might inquire whether there were or were not debts due at the testator's death. The *purpose* of payment of debts is, in fact, the only intelligible criterion of liability.

CHAPTER LXIV. money from him. By the law of Scotland, on the other hand, the trustee is vested with the full legal title to the property as disponent, and the beneficiary has only a *jus crediti* or right of action against the trustee, which does not carry with it the right of suing the debtors of the trust-estate, or entitle the beneficiary to grant a discharge. Such being the case, it is thought that, as the beneficiary, even under a trust for immediate distribution, is not in a position to demand payment from the purchaser, neither is the purchaser bound to recognise his interest in the transaction; but is bound only to pay to the trustee with whom he contracts.

Agreement from the nature of the beneficiary's interest in Scotland.

Exemption.

Fraud or connivance on the part of the purchaser.

2027. It is doubtful, however, whether sums advanced by a purchaser to a trustee, on the faith of the sale being afterwards completed, would be good payments in a question with the beneficiary; such advances not being made on the security of the trust-estate. (t) And if a purchaser connive at the malversation of the price, or become a party to any arrangement for the investment of the proceeds in the name of an individual trustee, (u) or go into the transaction in the knowledge of a latent trust inconsistent with the title, (x) he would be liable to pay over again at the suit of the beneficiary; or the transaction might be set aside by reduction. The observations of Lord Stair, as to the liability of singular successors for the fraudulent acts of their ancestors, ought to be conclusive of the main question. "Fraud," he observes, (y) "being of a criminal nature, it is not relevant against singular successors not partakers of the fraud, but only against the committers of the fraud, and those representing them, especially as to feudal rights; for so it is expressly provided by the fore-mentioned Statute; (z) the reason whereof is to secure land rights, and that purchasers be not disappointed; and therefore no action can be effectual against them, upon the fraud of their authors, unless they were accessory thereto, *at least by knowing the same when they purchased*; but supervenient knowledge will not prejudice them."

Statutory discharge of persons purchasing from heritable creditors holding powers of sale.

2028. In sales by heritable creditors, provision has been made by statute for securing purchasers against double distress for the price of the subjects; it being enacted (a) that the creditor, upon receipt of the price, shall be bound to consign the surplus which

(t) *Gordon v. Anderson*, 1748, M. 16,208, 6588, Elch. "Trust," No. 14.

(u) *Taylor v. Forbes & Co.*, 14 Dec. 1880, 4 W. & S. 444, reversing 5 Sh. 785; *Barrell v. Duncan*, 14 Dec. 1881, 10 Sh. 128; *Tait v. Kay*, 1779, M. 8142; *Alison v. Fairholme*, 1765, M. 15,182.

(x) *Macgowan v. Robb*, 29 March 1864, 2 Macph. 948; *Lang v. Mags. of Dumbarton*, 29 June 1818, F.C.

(y) Stair, 4, 40, 21.

(z) 1617, c. 12. The Statute, however, only applies to the case where prescription has run on the fraudulent act.

(a) 10 & 11 Vict., cap. 50, § 8.

may remain after deducting his debt, with interest and expenses, and after paying all previous encumbrances and the expense of discharging the same, in one or other of the Banks in Scotland incorporated by Act of Parliament or Royal Charter, or in a branch of any such bank, in the joint names of the seller and purchaser, for behoof of the party or parties having best right thereto. And it is further enacted, (b) that upon a sale being carried through in terms of the Act, and upon consignment of the surplus of the price, the disposition by the creditor to the purchaser shall have the effect of completely disencumbering the lands and others sold of all securities and diligences posterior to the security of such creditor, as well as of the security and diligence of such creditor himself. Corresponding provisions in relation to judicial sales at the instance of creditors and apparent heirs, selling under the powers of the Statute, were incorporated with the Bankruptcy Act (c) and the Judicial Procedure and Securities Act of 1856. (d)

2029. A purchaser from an heritable creditor, or trustee for creditors, paying the surplus funds into the hands of the exposor, (e) does so at his own risk; for he is bound either to settle extrajudicially with the other secured creditors, or to consign the balance in terms of the Statutes. (f) However, a purchaser will not be justified in consigning the portion of the price which is applicable to the payment of the debt of the exposor; and it would seem that if he consigns rashly he will be liable in legal interest for the time during which payment has been withheld. (g) Before payment of the balance, the purchaser may insist for a decree declaring the subjects to be freed and disburdened of the debt. He is not entitled to a discharge from the postponed creditors; who, on the other hand, are not entitled to insist in their security to any other effect than that of recovering the surplus proceeds of the sale. (h)

Consequences of paying to the exposor instead of consigning the price in bank.

SECTION III.

OF PURCHASES OF TRUST-ESTATE BY TRUSTEES.

In order to the complete discussion of the rule of law which

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| (b) <i>Ibid</i> , § 9. | Dec. 1831, 13 Sh. 116; <i>Steven v. Glen</i> , 19 |
| (c) 19 & 20 Vict., cap. 79, § 113. | Feb. 1811, F.C.; <i>Falconer v. Macintosh's Tr.</i> , |
| (d) 19 & 20 Vict., cap. 91, § 2. | 80 Nov. 1814, overruling <i>Middleton v. Fal-</i> |
| (e) <i>M'Lane v. Robertson</i> , 29 Nov. 1825, | <i>coner</i> , 1756, M. 1863. |
| 4 Sh. 232, N.E. 235; <i>Crawford v. Walker</i> , | (g) <i>Campbell v. Cullen</i> , 13 July 1849, 11 |
| 31 Jan. 1827, 5 Sh. 259, N.E. 241; <i>Wil-</i> | D. 1854. |
| <i>son v. Stirling</i> , 14 March 1848, 8 D. 1261, | (h) <i>Wilson v. Stirling</i> , 14 March 1843, |
| <i>per Lord Ivory</i> . | 8 D. 1261; <i>Young v. Grierson</i> , 19 July |
| (f) See <i>E. of Dunmore v. Dickson</i> , 2 | 1849, 11 D. 1482. |

CHAPTER LXIV. protects trust-property from appropriation by persons intrusted with the execution of powers of sale, it is necessary to consider, *first*, the extent of the disability; *secondly*, the nature of the remedy.

Trustee cannot enter into transactions of profit with the trust-estate.

2030. I. WHO ARE DISQUALIFIED FOR PURCHASING TRUST-ESTATE? —The leading rule on this subject may be deduced from equitable considerations of a very general nature, such as, that persons standing in a relation of confidence towards others ought not to be allowed to engage in any transactions whereby the interests of their constituents are put in jeopardy. Speaking generally, we may say that, at common law, *a trustee for sale* (that is, any person exposing for sale property not his own) is disqualified from becoming a purchaser for his own benefit, *(i)* whether the property consists of heritable subjects, *(k)* or of corporeal moveables, such as ships, *(l)* or of assignable rights, such as debts *(m)* or shares; *(n)* whether the purchase be made by way of private bargain, *(o)* or at a public auction; *(p)* in his own name, or through the intervention of another; *(q)* for himself, or as the representative of parties interested in the estate; *(r)* by his own authority, or with the sanction of his co-trustees. *(s)* It is assumed that the motives of parties engaged in such transactions are expressed in the maxim of political economy — *Emptor emit quàm minime potest, venditor vendit quàm maxime potest*; and such conflicting motives ought to have no place in the mind of a trustee.

English and Scotch authorities compared.

2031. In one of the latest cases relating to transactions of profit between trustees and their constituents, Lord Brougham begins by observing that the law of Scotland differs in no respect from the law of England upon this matter, as to which, he says, it is very important to have it understood that there is really no difference be-

(i) *York Buildings Co. v. Mackenzie*, 1793, M. 18,867, 16,212, reversed 18 May 1795, 8 Pat. 378; 8 Br. Par. C. 42; *Brisbane's Trs. v. Crawford*, 3 Feb. 1826, 4 Sh. 422, N. E. 427; *Jeffrey v. Aiken*, 16 June 1826, 4 Sh. 722, N. E. 728; *Gourlay's Trs. v. Kerr*, 6 June 1857, 19 D. 789; and see *Aberdeen Ry. Co. v. Blaikie*, 19 Nov. 1851, 14 D. 66, reversed 20 July 1854, 1 Macq. 461.

(k) *York Buildings Co. v. Mackenzie*; *Jeffrey v. Aiken*, *supra*, etc.

(l) *Elias v. Black*, 9 July 1856, 18 D. 1225.

(m) *Thorburn v. Martin*, 8 July 1853, 15 D. 845; *Mackellar v. Balmain*, 8 March 1817, F.C.

(n) *Gourlay's Trs. v. Kerr*, *ubi supra*.

(o) See *Browning v. Hamilton*, 25 May 1837, 15 Sh. 1004.

(p) *York Buildings Co. v. Mackenzie*, *Jeffrey v. Aiken*, *ubi supra*; *Whyte's Trs. v. Burt*, 13 Feb. 1851, 18 D. 679; *Elias v. Black*, 18 D. 1229.

(q) *Jeffrey v. Aiken*, *ubi supra*; *Anderson v. Stewart*, 16 Dec. 1814, F.C.; *Taylor v. Watson*, 20 Jan. 1846, 8 D. 400; *Brown v. Burt*, 28 Dec. 1848, 11 D. 888.

(r) *Maxwell v. Drummond's Trs.*, 21 Jan. 1823, 2 Sh. 130, N. E. 122; *Drysdale v. Nairne*, 28 Jan. 1835, 13 Sh. 848.

(s) *Thorburn v. Martin*, 15 D. 852, *per* Lord Wood; *Aberdeen Ry. Co. v. Blaikie*, 1 Macq. 478, *per* Lord Cranworth; *Brisbane's Trs. v. Crawford*, 3 Feb. 1826, 4 Sh. 422, N. E. 427.

tween the two systems of jurisprudence. (t) Although identical in principle, yet, as regards the mode of applying the principle, it may be questioned whether the two systems run exactly parallel. Be this as it may, it is certain that the decisions of the Scotch Courts afford sufficient materials for the full exposition of this branch of the law, and on them accordingly the text of this chapter is exclusively founded. (u)

2032. The leading authority in this department of what we may be permitted to call British common law, is the celebrated case of the *York Buildings Co. v. Mackenzie*, (x) decided by Lord Thurlow on appeal from the Court of Session. The grounds of this decision are well adapted to illustrate the perfectly general character of the rule which was there laid down for the first time; and it has accordingly become a precedent for the decision of a host of analogous cases under the English and Scotch equitable jurisdiction. (y) The respondent in this case, while holding the office of common agent in the sale of the Scotch estates of the York Buildings Company, which was insolvent, purchased a portion of them at the judicial auction; and though he had remained in possession for above eleven years after the purchase, and had entirely freed himself from all imputation of fraud, yet the Court of appeal ordered him to reconvey the property, holding that his situation as common agent made it his duty, both to the company and their creditors, to obtain the highest

(t) *Aberdeen Ry. Co. v. Blaikie*, 1 Macq. 477; and see *ibid*, p. 473-4, *per* Lord Cranworth.

(u) The rule laid down in the leading English case of *Fox v. Mackreth*, 2 Br. C. C. 400, 2 Cox, 320, was, that a purchase by a trustee for sale from his *cestui que trust* (and *a fortiori* a purchase by the trustee from *himself*), although he may have given an adequate price and gained no advantage, shall be set aside at the option of the *cestui que trust*, unless (1) the connection between them appear to have been completely dissolved; and (2) that all knowledge of the value of the property acquired by the trustee has been communicated to his constituent; 1 Wh. & T. L. Ca. 3d. ed. p. 137. "It is founded upon this:—That though you may see, in a particular case, that the trustee has not made advantage, it is utterly impossible to examine, upon satisfactory evidence, in ninety-nine cases out of a hundred, whether he has made advantage or not;" *per* Lord Eldon in *ex parte Lacey*, 6 Ves. 627.

(x) 3 Pat. 378; 8 Br. P. Ca. 42.

(y) *Per* Lord Brougham in *Aberdeen Ry. Co. v. Blaikie*, 1 Macq. 478. It appears, however, to have been considered by some of the English jurists that a purchase by an agent from his constituent might be sustained if it were clear that the agent had dealt openly with the client; 1 Wh. & T. L. Ca. 3d. ed. p. 143; the principle being thus stated by Lord Erskine in *Lowther v. Lowther*, 13 Ves. 108, "that an agent to sell shall not convert himself into a purchaser, unless he can make it perfectly clear that he furnished his employer with all the knowledge which he himself possessed." It is quite well settled, as Sir E. Sugden, L.-C., remarked in *Murphy v. O'Shea*, that it is not necessary to prove undervalue; though he added, "The rule of the Court does not prevent an agent from purchasing from his principal, but only requires that he shall deal with him at arm's length, and after a full disclosure of all he knows with respect to the property" (2 J. & Lat. 425).

CHAPTER LXIV. price for the property—a duty which could not be fulfilled if he became the purchaser.(z)

Meaning of the
disability at-
taching to the
office.

2033. The manner in which the interest of a purchasing trustee may be brought into conflict with his duty is well explained in Lord Colonsay's opinion in a recent case,(a) where the property, a vessel, was bought by the creditor at a judicial sale. "It is impossible," he observed, "to say that a party who takes the management of a sale of property so implicitly as Black did through Pirie, had not a fiduciary character in reference to the owner, and all parties interested. He had the vessel in his own keeping, and had it in his power to bring on the sale tardily, or at a time suitable to himself. I do not say that he did so; but he had it in his power to do so. He suggested the valuers, who, although acting perfectly honestly, might yet have opinions in regard to the vessel favourable to him. Reference is made to his agent when he had the vessel in his hands, and who might encourage or discourage people from bidding at the sale." His Lordship went on to say, "But if Black had abstained altogether from doing anything further than setting a-going the proceedings by bringing the summons of sale, it is not very easy to see whether, in that case, it might not have been perfectly legal for him to become the purchaser."(b)

Whether the
illegality of the
transaction de-
pends on the
circumstances of
the trustee hav-
ing acted.

2034. It will be proper to consider how far this suggestion of a doubt as to the illegality of a purchase by a trustee or party to judicial proceedings who does not interfere *actively*, is supported by previous authorities. On the one hand, it is certain that the counsel who merely signs a petition for a warrant of sale is free to become a purchaser;(c) from which we may infer that persons who have no *duty* to perform to the owner or his creditors, and no *means or opportunities* of gaining an advantage through their position, are excepted from the rule. The case of *Darling v. Adamson*,(d) where a purchase by the husband of one of the beneficiaries was sustained, is similar. Clearly, his relations with the trust were not fiduciary, nor does it appear that he had any power of controlling the sale. It is held, in England, that the merely nominal position of a trustee to preserve contingent remainders does not disqualify the party from purchasing, the estate being exposed by trustees under a *different appointment*.(e) But, on the other hand, it is not permitted to an heritable creditor to become a purchaser of property brought

(z) 8 Pat. 898, *per* Lord Thurlow.

(d) *Darling v. Adamson*, 8 Dec. 1838, 1

(a) *Elias v. Black*, 11 July 1856, 18 D. D. 218.
1225.

(b) 18 D. 1280.

(e) *Sutton v. Jones*, 15 Ves. 587; *Naylor v. Winck*, 1 S. & S. 567.

(c) *E. of Wemyss v. Montgomery*, 25 Feb. 1824, 2 Sh. Ap. Ca. 8.

to sale under the power in his bond, (f) though Lord Mackenzie thought that he might have a title to apply for the appointment of a judicial manager of the sale, with the view of becoming a buyer. (g) The observations of Lords Brougham and Cranworth in the two cases quoted below, (h) clearly imply that the disability to contract with their constituents, attaching to trustees and managers, is not obviated by their remaining neutral; because it is the duty of such persons to interfere actively, and to use the knowledge acquired as trustees, not for their own advantage, but for the benefit of their employers.

2035. The Court has certainly never given any encouragement to the notion that evidence of the trustee having gained an advantage was necessary in order to invalidate the purchase. In the case of *Jeffrey v. Aiken*, the evidence was all the other way; because the property was bought in after a competition, and that only to prevent the land from going at a lower price, which must have been the result had the creditor not offered more. There was no imputation of unfair dealing, and the Court must have gone on the principle that a trustee cannot be the purchaser at a sale under his own authority. (i) In *Taylor v. Watson*, Lord Jeffrey observed, that the rule was so peremptorily fixed that the Court should not be tempted by considerations of equity to unsettle it. "It is now *presumptio juris et de jure*," he said, "that where a person stands in these inconsistent relations of buyer and seller, there are dangers; and it is not relevant to say that is impossible there could be any in the particular case." (k) The doctrine thus generally stated has been affirmed by the decisions of the House of Lords already referred to; and, as it is obviously impossible to ascertain, in the generality of cases, whether the terms on which a trustee has dealt with the estate or interests of his constituents were the best that were

Inquiry into the fairness of the transaction held inadmissible.

(f) *Jeffrey v. Aiken*, 16 June 1826, 4 Sh. 722, N.E. 728; *Taylor v. Watson*, 20 Jan. 1846, 8 D. 400.

(g) 8 D. 406; and see *Maxwell v. Drummond's Trs.*, 21 June 1828, 2 Sh. 180, N.E. 122. In England a mortgagee with a power of sale is subject to the same disqualification as a trustee; *Waters v. Groom*, 11 Cl. & Fin. 684; *Downes v. Glazebrook*, 8 Mer. 200. But a purchase of the reversion or "equity of redemption" from the proprietor is not impeachable on equitable grounds, for the relation between the parties is that of contract; *Knight v. Marjoribanks*, 2 Macn. & G. 10. In this case the mortgagee was trustee for the mortgagor

of other property; but Lord Cottenham held that the existence of the fiduciary relation could not affect the fairness of transactions unconnected with the subject of the trust.

(h) *Hamilton v. Wright*, 2 Aug. 1842, 1 Bell, 591, per Lord Brougham; *Aberdeen Ry. Co. v. Blaikie*, 20 July 1854, 1 Macq. 478, per Lord Cranworth; *York Buildings Co. v. Mackenzie*, 3 Pat. 398, per Lord Loughborough.

(i) *Jeffrey v. Aiken*, 16 June 1826, 4 Sh. 722, N.E. 728, as explained per Lord Fullerton in *Taylor v. Watson*, 8 D. 407; see Lord St Leonard's dictum, *supra*, § 2082, note.

(k) 8 D. 407.

attainable, the rule has been established that no inquiry on that subject will be permitted.^(l) Besides, if a trustee were permitted to come forward openly as a purchaser, it would discourage others from coming forward against so formidable a competitor, and so the sale would be checked.^(m)

The rule applies to factors, agents, and brokers, etc.

2036. The rule which prohibits trustees for sale from becoming purchasers is applicable not only to those whom the law regards as trustees *virtute officii*, as trust-disponces,⁽ⁿ⁾ executors, guardians, and judicial factors, but to all who, in relation to the transaction itself, have a duty to perform towards the beneficiary, as interdictors,^(o) stockbrokers,^(p) directors of banking and railway companies:^(q) the agent^(r) or auctioneer employed to effect the sale:^(s) the common agent in a judicial sale:^(t) the commissioners^(u) and trustees on sequestrated estates.^(x) And if an heir of entail, taking advantage of the provisions of the 42 Geo. III., cap. 116, as to the redemption of land-tax, sell a larger portion of the estate than is necessary for that purpose, or become the purchaser of the lands either *in nomine* or through a confidential person, the sale will be reduced;^(y) and the reduction may even be enforced at the instance of succeeding heirs against an onerous purchaser, if there was a

(l) *Aberdeen Ry. Co. v. Blaikie*, 1 Macq. 472, per Lord Cranworth. See also *Fraser v. Hankey*, 9 D. 423, per Lord President Hope; and *York Buildings Co. v. Mackenzie*, 3 Pat. 316, per Lord Thurlow, quoting Lord Hardwicke.

(m) *Ex parte Lacey*, 6 Ves. 629.

(n) *Strickland's Trs. v. Crawford*, 3 Feb. 1826, 4 Sh. 422, N. E. 427.

(o) *Gillies v. MacLachlan's Reps.*, 11 Feb. 1846, 8 D. 487.

(p) In *Gillatt v. Peppercorne*, 8 Beav. 78, Lord Langdale, M.-R., set aside a sale of canal shares, which the stockbroker who was employed to purchase them had bought from a person who was truly a trustee for himself; for, said his Lordship, "where a man employs another as his agent, it is on the faith that such agent will act in the matter purely and disinterestedly for the benefit of his employer, and assuredly not with the notion that the person whose assistance is required as agent has himself, in the very transaction, an interest directly opposed to that of his principal;" 8 Beav. 88. This was the case of an agent selling to his constituent; but in the earlier case of *Brookman v. Rothschild*, 8 Sim. 153, Lord Lyndhurst set aside a transaction in

which the late Mr N. M. Rothschild, when employed to sell 20,000 French Rentes, had taken the securities to himself, giving credit for them—so his Lordship held—at the fair price of the day; adding, however, that the Court must maintain the principle that an agent, if he accepts the employment, is bound to sell, and is not at liberty to take over the stock, giving credit for the price.

(q) *Thorburn v. Martin*, 8 July 1853, 15 D. 845; *Aberdeen Ry. Co. v. Blaikie*, 20 July 1854, 1 Macq. 461.

(r) *Gowlay's Trs. v. Kerr*, 6 June 1857, 19 D. 789.

(s) *Jeffrey v. Aiken*, 4 Sh. 722, N. E. 728; *Cree v. Durie*, 1 Dec. 1810, F.C.

(t) *York Buildings Co. v. Mackenzie*, 3 Pat. 378.

(u) 19 & 20 Vict., cap. 79, § 120; *Drew v. Paterson*, 2 Dec. 1825, 4 Sh. 259, N. E. 264; *Mackellar v. Balmain*, 8 Mar. 1817, F.C.

(x) *Id.* Stat. § 120; *Whyte's Tr. v. Burt*, 28 Dec. 1848, 11 D. 338; 18 Feb. 1851, 18 D. 679; *Fraser v. Hankey*, 13 Jan. 1847, 9 D. 415.

(y) *Elliott v. Wilson*, *infra*; *Hamilton v. Millar*, 10 Dec. 1830, 9 Sh. 165.

manifest excess.(z) In the case of an individual trustee acquiring estate by assignation from a *bona fide* purchaser from the trustees, there can be no objection to the trustees granting a conveyance to the assignee in implement of their obligation to the purchaser.(a)

2037. Parties who are beneficially interested in the estate are disqualified from purchasing at an auction on a different ground, viz., because they are regarded as virtually occupying the position of exposers, and are consequently not entitled to raise the price to *bona fide* purchasers.(b) A bankrupt cannot purchase the sequestrated estate,(c) and the privilege of purchasing is enjoyed by creditors only in virtue of the statutory declaration to that effect.(d) In *Darling v. Adamson*,(e) where the purchaser was the husband of one of the beneficiaries, the purchase was objected to on the ground that the sale had been carried through in a process of implement raised by the beneficiaries; but the sale was sustained. However, in the more recent case of *Faulds v. Corbet*,(f) it was held that a sale to a residuary legatee was reducible at the instance of a previous bidder, as being substantially an attempt to raise the upset price by one who was in reality the exposor of the subjects.

How far the beneficiary is excluded by this rule from becoming a purchaser.

2038. With respect to sales for behoof of creditors, the capacity to purchase depends partly on statute and partly on common law. At common law, creditors selling under a power of sale,(g) or in a judicial process of sale,(h) have been held disqualified, and the disability has not been removed by the recent Statutes. If the exposing creditor is a corporation or a trust, the trustees or corporators are precluded from bidding, whether in their representative capacity or as individuals.(i) Under the former Bankruptcy Act,(k) which declared that it should be lawful to *any* creditor to purchase estates sold in virtue of its provisions, it was ruled that a purchase by an heritable creditor, who held a security over the estate, was valid.(l) The present Bankruptcy Act enacts,(m) that "when any estate is

Purchase by creditor of the trust-estate, whether competent.

(z) *Elliott v. Wilson*, 9 Feb. 1826, 4 Sh. 429, N. E. 485, affirmed 2 May 1828, 3 W. & S. 60.

(a) *Fleming v. Imrie's Trs.*, 11 Feb. 1868.

(b) Bell's Pr. § 131, and cases there cited.

(c) *Anderson v. Stewart*, 16 Dec. 1814, F.C.

(d) 19 & 20 Vict., cap. 79, § 120.

(e) *Darling v. Adamson*, 8 Dec. 1838, 1 D. 218.

(f) *Faulds v. Corbet*, 25 Feb. 1859, 21 D. 587.

(g) *Taylor v. Watson*, 20 Jan. 1846, 8 D. 400; *Jeffrey v. Aiken*, *supra*.

(h) *Elias v. Black*, 9 July 1856, 18 D. 1225.

(i) *Maxwell v. Drummond's Trs.*, 21 Jan. 1828, 2 Sh. 180, N. E. 122.

(k) 2 & 3 Vict., cap. 41, § 99.

(l) *Cruickshank v. Williams*, 15 Feb. 1849, 11 D. 614.

(m) § 120. The assignees of an English bankrupt cannot purchase the trust-property. See *ex parte Chadwick* and *ex parte Thwaites*, cited in Montague and Ayrton on Bankruptcy, 2d ed. 1, 829 and 823, and cases cited in 1 Wh. & T. L. Ca. 8d ed. p. 148. Lord Eldon doubted whe-

CHAPTER LXIV. sold *publicly* by virtue of this Act, it shall be lawful for any creditor to purchase the same; but the trustee, or commissioners, or adjudger, selling as aforesaid, (n) shall not be entitled to purchase." The 29th section of the Personal Diligence Act(o) provides, that where goods are sold by public roup under the authority of the Sheriff, "it shall be lawful for the poinder or any other creditor to purchase the same."

Disability of agent, whether special or general.

2039. It may be doubted whether an agent is disqualified in consequence of the general relation subsisting between himself and the beneficiary, or if the disqualification arises only from his being employed in connection with the sale. Where the agent is himself the vendor, (p) or where he has even a general management, the purchase is clearly illegal. (q) If the employment is special, and relates to an entirely different matter, there can, we apprehend, be as little doubt that the agent is free to purchase. A more difficult case is presented in *Drysdale v. Nairn*. (r) The agent in this case was trustee under a voluntary trust-disposition, and in that capacity had made large advances to his client. After her death, a creditor holding a preferable security brought the property to sale under a power in the bond. The trustee, who was in effect a postponed creditor, bought in the estate at the price of £4600, in order to preserve his security, which would have been lost if the estate had been sold for an inadequate price. At the same time, he intimated to the truster's heir-at-law that he would hold himself accountable for any surplus which the estate might ultimately yield. No decision was pronounced on the merits of this case; but it is clear that the trust remaining in the purchaser was a function quite distinct from that of the power of sale, which was conferred on a different party, and in relation to a different transaction. Both the purchaser and the vendor were trustees for the heir's reversionary interest; and as no profit could be made by either of them, we do not see on what principle the transaction could be condemned.

Trustee may purchase from the beneficiary.

2040. If the trustee has been authorised by the truster or by the beneficiaries, being *sui juris*, to become a purchaser, the right of challenge is barred; (s) and on similar grounds, it would appear

ther the assent of the majority of the creditors would validate the transaction (*ex parte Lacey*, 6 Ves. 628), notwithstanding Lord Hardwicke's decision to the contrary in *Whelpdale v. Cookson*, 1 Ves. sen. 9, cited 5 Ves. 682.

(n) See §§ 112, 113.

(o) 1 & 2 Vict., cap. 114.

(p) *Gourlay's Trs. v. Kerr*, 6 June 1857, 19 D. 789.

(q) *Thorburn v. Martin*, 15 D. 849, per Lord Justice-Clerk Hope,

(r) *Drysdale v. Nairne*, 28 Jan. 1885, 18 Sh. 848. See *Lowther v. Lowther*, and *Murphy v. O'Shea*, stated *supra*, § 2032.

(s) *Fraser v. Hankey*, 18 Jan. 1847, 9 D. 415.

that a purchase from the beneficiary himself is unobjectionable; (t) CHAPTER LXIV. though it must be admitted that this branch of the subject has not been elaborated by our Courts with the same care as it has been in England. (u) Where the truster has a reversionary interest in the estate, as in the case of trusts for payment of debts, he may object to an offer being received on behalf of the trustee, although the creditors should consent. (x)

2041. The disability has been held to be obviated by the resignation of the trustee before any step has been taken to carry through the sale, on the ground that the purchaser is then no longer in the position of having a duty to discharge adverse to his interest as purchaser. (y) Accordingly, where the trustee on a sequestrated estate had been superseded in consequence of having attempted to purchase the bankrupt's property at an auction, and the Court in consequence ordered the subjects to be re-exposed, he was permitted to purchase the same property from the new trustee. (z)

2402. As to the trustee's right to purchase after resignation, conflicting opinions have been entertained by the judges of the Court of Chancery. Thus, in *ex parte James*, (a) Lord Eldon observed:—"With respect to the question, whether I will permit Jones to give up the office of solicitor, and to bid? I cannot give that permission. It would lead to all the mischief of acting up to the point of sale, —getting all the information that may be useful to him, then discharging himself from the character of solicitor, and buying the property." Lord Cranworth, however, in the Scotch appeal case of the *Aberdeen Railway Co.*, observed, that the more accurate rule

Objection held to be obviated by the resignation of the trustee *debito tempore*.

Doctrine of the Court of Chancery in relation to the effect of resignation.

(t) *Browning v. Hamilton*, 25 May 1837, 15 Sh. 999.

(u) See *Brisbane's Trs. v. Crawford*, 8 Feb. 1826, 4 Sh. 422, N. E. 427. Lord Eldon's judgments on this point do not exhibit that degree of consistency and clear apprehension of principle that usually characterised his decisions. For example, in commenting (in *ex parte Lacey*, 6 Ves. 627) upon *Fox v. Mackreth*, Lord Eldon argued that the judgment could only be defended on the principle that all transactions between trustee and beneficiary were forbidden *while the relation subsisted*, for there was no reason to impute unfairness to Mackreth in the transactions. But in *Coles v. Trecothick*, 9 Ves. 284, his Lordship sustained a purchase by a trustee for payment of debts from the beneficiary, on the ground that the sale had been carried

through by the beneficiary himself, without the active interference of the trustee; adding, "A trustee may buy from the *cestui que trust*, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, that the *cestui que trust* intended that the trustee should buy; and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee."

(x) Lewin on Trusts, 5th ed. p. 337–339.

(y) *Gillies v. M'Lachlan*, 8 D. 498, *per* Lord Cuninghame; *Brown v. Burt*, 11 D. 342, *per* Lord Moncreiff; *Smith v. Robertson*, 10 Feb. 1826, 4 Sh. 442, N. E. 448.

(z) *Whyte's Tr. v. Burt*, 13 Feb. 1851, 13 D. 679.

(a) *Ex parte James*, 8 Ves. 352.

CHAPTER LXIV. would be, that, while the relation subsisted, there should be no such dealing, *but that after cesser of the relation, the purchaser should be permitted to show fairness in the transaction.*(b)

Trustee acquiring without onerous cause.

2043. In connection with the subject of purchases by trustees, we may notice the case of a trustee acquiring property without onerous cause ; in which case it would seem the acquisition ought to result to the heir.(c) The principle of constructive trust applies also to the case of a purchase, by a trustee, of property in which the beneficiary has only a partial interest.(d)

2044. II. REMEDIES COMPETENT TO THE BENEFICIARY.—As pertaining to the law of the remedy, we shall have to consider the nature of the procedure against purchasers and singular successors ; the terms on which the sale will be set aside ; and the limitation of the remedy arising from express or implied acquiescence.

Purchases by trustees not null, but reducible at the suit of a party interested.

2045. It is quite a settled point, as we shall immediately see,(e) that a contract of sale, though prohibited by the common law on any of the grounds above mentioned, is not void *ab initio*, but only voidable. The inference is obvious, that the purchaser's title will remain good until set aside in a process of reduction ; and this accordingly was the form of procedure adopted in almost all the cases we have cited, certainly in every case in which it was sought to recover the property.(f) On considering, further, that such purchases may be rendered perfectly valid, or at least unchallengeable, by the assent of all parties interested, we arrive at another general principle, namely, that a *reduction* will only be entertained when brought by some party who has an interest in the trust-estate, or who is responsible for its administration. A bankrupt who has been charged to execute a conveyance to his trustee personally, may, it is true, try the question in a suspension ;(g) but it will be observed that purchases by trustees in bankruptcy are prohibited by statute ; and we shall have to consider whether this statutory prohibition does not render the purchase an absolute nullity, in which case reduction would perhaps be unnecessary.(h) A recis-

(b) *Aberdeen Raily. Co. v. Blaikie Brs.*, 1 Macq. 464. So in *ex parte Perkes*, 8 M. D. & De Gex, 885, the Court of Chancery allowed the assignee of a bankrupt to relinquish the office, in order that he might bid at the sale of the bankrupt's estate ; and in a later case, where the Court refused to allow the assignee to bid, he was permitted to name the price he would give if the property were not sold by auction, and afterwards to buy at that price ; *ex parte Holyman*, 8 Jur. 156. See also *ex*

parte Gore, 8 M. D. & De Gex, 77 ; 6 Jur. 1118 ; 7 Jur. 136.

(c) *Cochran v. Cochran*, 1782, M. 16,889.

(d) *Gillies v. M'Lachlan's Reps.*, 11 Feb. 1846, 8 D. 487 ; see *Drysdale v. Nairne*, 28 Jan. 1835, 13 Sh. 848.

(e) *Infra*, § 2048 *et seq.*

(f) See *Fraser v. Hankey*, 18 Jan. 1847, 9 D. 415 ; and cases formerly cited, *passim*.

(g) *Maxwell v. Drummond's Trs.*, 21 Jan. 1828, 2 Sh. 181, N. E. 122.

(h) *Infra*, § 2058.

sory process, however, must be resorted to when the purchase is to be declared void at common law; and if the transaction have already been implemented, the summons will conclude, not only for the reduction of the minutes of sale, articles of roup, etc., but also of the disposition and sasine, or other title of constitution, and of all subsequent deeds of transmission.(i) The summons may also embrace a conclusion for compensation or damages.(k) Forms of issues adapted for trying the question of title will be found in the cases of *Gourlay's Trs. v. Kerr*,(l) and *Elias v. Black*.(m) Where the purchase has been made at a judicial auction, it would seem that any question as to its legality may be competently raised in the depending process.(n)

2046. Among the parties who are considered to have a legal interest to reduce the sale, we may name the purchaser's co-trustee,(o) because he is liable to be called to account for permitting the sale;(p) the debtor, where the sale takes place under a power contained in a voluntary trust-deed or heritable security,(q) because a trustee for creditors is also a trustee for the debtor of the reversion;(r) a postponed creditor;(s) and also the general body of creditors, or a new trustee appointed to represent their interest.(t) Lord Cuninghame thought that a bankrupt had no interest entitling him to challenge a sale to the trustee on his sequestrated estate, as the loss, if any, must fall exclusively on the creditors;(u) but this view is scarcely in accordance with the precedent established in the analogous case of the ranking and sale of the estates of the York Buildings Company.(x) It has been observed that an individual creditor might competently insist, for his own interest, in a reduction of a sale to a trustee, if a majority of the creditors agreed to homologate the transaction without giving him due notice;(y) but in an earlier case it seems to have been doubted whether the instance of the representative of a creditor, who was defunct, was a

What parties have a sufficient interest to reduce a sale of the trust estate to a trustee.

(i) *Ibid.*, *York Buildings Co. v. Mackenzie*, 3 Pat. 401 (judgment).

(k) *Balfour v. Kerr*, 20 Feb. 1856, 18 D. 620.

(l) *Gourlay's Trs. v. Kerr*, 6 June 1857, 19 D. 790.

(m) *Elias v. Black*, 18 D., 1227. See form of issue of damages in *Whyte's Trs. v. Burt*, 13 Feb. 1851, 13 D. 680.

(n) *Darling v. Adamson*, 8 Dec. 1828, 1 D. 213.

(o) *Ibid.*

(p) See *Thorburn v. Martin*, 15 D. 848. per Lord Justice-Clerk Hope.

(q) *Maxwell v. Drummond's Trs.*; *Jeffrey v. Aiken*, *supra*.

(r) *Hamilton v. Wright*, 1 Pat., 574, per Lord Brougham.

(s) *Kerr v. M'Arthur's Trs.*, 28 Dec. 1848, 11 D. 352.

(t) *Whyte's Trs. v. Burt*, *supra*.

(u) *Fraser v. Hankey*, 9 D. 422; and see *ib.* p. 422, per Lord Fullerton.

(x) *York Buildings Co. v. Mackenzie* 3 Pat. 278.

(y) Per Lord Wood in *Thorburn v. Martin*, 15 D. 852.

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sufficient title to sue.(z) Lastly, it is settled that an unsuccessful bidder at the sale is entitled to pursue a reduction; and it would seem that he has an option either to reduce the whole transaction or to claim the estate at the price he bid for it.(a)

No action lies against a co-trustee unless accessory to the purchase.

2047. Where an action of reduction was directed against a purchasing trustee, and also against a co-trustee who was held to have been somewhat remiss in his duty, though not directly accessory to the illegal sale, the Court assoilzied the co-trustee, but found him entitled only to modified expenses.(b) We shall merely cite two cases (c) in which proceedings were taken against trustees for sale by petition and complaint. The subject of the removal of trustees is reserved for consideration in a subsequent chapter.

Beneficiary may either ratify the sale or demand a reconveyance or resale.

2048. As to the terms on which an illegal purchase will be set aside, it appears that the practice of our Courts leaves a certain option to the aggrieved party. For, in the first place, the beneficiary may compel the trustee to carry out the arrangement, if it turns out to be for the benefit of the estate. "The result of a trustee purchasing property," said Lord Cockburn, "is that the transaction is voidable, not that it is void. If it be chosen, he may be kept to his bargain." (d) Or, secondly, the constituent may demand a reconveyance of the estate, subject to the payment of the price, on the principle that the acquisition was a constructive trust for his behoof. On this principle, where the law agents and trustees of an heritable creditor purchased the subjects over which their client's security extended, the Court ordained the trustees to convey the property to their client, the pursuer of the action.(e) Lastly, the constituent may repudiate the transaction altogether and insist upon a resale.

Whether the beneficiary is bound to accept a reconveyance where he does not allege special damage.

2049. It will generally be for the interest of the trustee, or purchaser, to offer to execute a *reconveyance* of the property, as by this method he will get back the purchase-money, and escape from all further liability; while, in the alternative case of a *resale*, he might be obliged to make good the difference between the selling price and that which he had previously given.(f) Where the power of selling was in the purchaser himself (as in the case of a sale by an heritable creditor to himself in the attempted exercise of his power

(z) *Smith v. Robertson*, 10 Feb. 1828, 4 Sh. 444.

(a) *Abercrombie v. Burt*, 13 D. 682; *Faulds v. Corbet*, 25 Feb. 1859, 21 D. 587; *contra*, *Aberdeen v. Stratton's Trs.*, 29 Mar. 1867, 5 Macph. 726.

(b) *Thorburn v. Martin*, 8 July 1858, 15 D. 845.

(c) *Drew v. Paterson*, 2 Dec. 1825, 4 Sh. 259, N. E. 264; *Brown v. Burt*, 23 Dec. 1848, 11 D. 838.

(d) *Thorburn v. Martin*, 15 D. 850.

(e) *Gillies v. MacLachlan*; see the interlocutor, 8 D. 508.

(f) See *infra*, § 2054.

of sale), the Court has been satisfied with the offer of a reconveyance ;(g) as in that way the *status quo* as between debtor and creditor is restored ; and because it would be unreasonable to compel the creditor against his will to exercise a power of sale which was granted solely for his benefit. Accordingly, where heritable creditors (defenders) offered to abandon a sale, and to account for their intromissions with the subjects upon receiving payment of their debts with the accruing interest, the Court remitted to an accountant to make up a state of the balance between the pursuer and defender, holding them still to stand in the relation to each other of debtor and creditor.(h) Where, again, the complaint is, that the property was purchased by a trustee, or an agent employed to conduct the sale, the object of the pursuer generally is to recover the specific subject, on the ground that it has been sold below its value ; and the proper course would appear to be simply to reduce the sale, by which means the pursuer is at once reinvested in his property.(i) It is clear that in such a case a beneficiary is entitled to claim a reconveyance of the specific estate.

2050. The beneficiary will be entitled to recover, along with the property, the rents and profits uplifted during the purchaser's possession ; and he will of course be liable in repetition of the price.(k) In *Mackenzie's* case, the judgment of the House of Lords contains an elaborate series of findings in relation to the mutual claims of the parties against each other. It is declared that the defender ought to refund to the company all the rents and profits he had received out of the estate, and an adequate consideration for the enjoyment of such part thereof as he had occupied himself. The pursuers, on the other hand, were found liable in repayment of the price, and also of all sums expended on the permanent improvement of the property ; and an account was directed to be taken of the defender's receipts and disbursements, in which periodical interest was to be allowed on both sides to the date of the decree. And it was ordered that, on payment of the balance found due by either party, " the defender do reconvey the said estates to the pursuers, subject to the demands of their creditors, and to the leases and other contracts as aforesaid, in such manner as the Court shall think fit to direct."(l) In a subsequent appeal, their Lordships affirmed the decision of the

Rents and profits of possession ; rule as to their appropriation where sale set aside.

(g) *Maxwell v. Drummond's Trs.*, 2 Sh. 132 ; *Taylor v. Watson*, 8 D. 403, see the interlocutor ; *Darling v. Adamson*, 1 D. 213.

(h) *Taylor v. Watson*, *ubi supra*.

(i) See *Gourlay's Trs. v. Kerr*, 6 June 1857, 19 D. 789.

(k) *York Buildings Co. v. Mackenzie*, 3 Pat. 401 ; *Maxwell v. Drummond's Trs.*, 2 Sh. 132, N. E. 122 ; *Elliott v. Wilson*, 4 Sh. 481, N. E. 435 ; affirmed 1 April 1828, 3 W. & S. 60.

(l) 3 Pat. 402.

CHAPTER LXIV. Court of Session, fixing five per cent. as the rate of interest chargeable on each side of the account. (m) We have thought it desirable to state thus fully the terms of Lord Thurlow's final judgment, because Lord Brougham, in referring to this celebrated case, fell into the mistake of supposing that the maxim, *bona fide possessor fructus perceptos et consumptos suos facit*, was given effect to in the ultimate decision. (n) A trustee purchasing the trust-estate cannot be regarded as a *bona fide* possessor. But a stranger purchasing from one who is guilty of a breach of trust in selling, is entitled to the benefit of this equitable principle. (o)

Trustees are entitled to allowances for outlay and meliorations.

2051. The trustee will be allowed the cost of any permanent improvements or meliorations which he may have undertaken *bona fide*, (p) including even such ornamental improvements as inclosing and planting, and the cost of building a new mansion-house and lodge, laying out shrubberies, etc. (q) But it appears from the tenor of Lord Brougham's observations in the *Aberdeen Railway* case, (r) that such claims are only sustained out of favour to parties who have purchased in ignorance of the law; and are not therefore to be extended without reservation to fraudulent purchasers. This is also the view taken by the English Courts of Equity, who, in cases of actual fraud, will make allowance for necessary repairs, but not for improvements. (s) If the property have deteriorated during the possession of the trustee, it is held, in England, that the purchase-money due to him must suffer a proportionate abatement. (t)

Whether the estate may be reclaimed from a party purchasing *bona fide* from a fraudulent purchaser.

2052. No positive rule appears as yet to have been laid down regarding the liability of *bona fide* onerous purchasers from fraudulent trustees. In *Elliott v. Wilson*, (u) which was a reduction by a substitute heir of entail of a judicial sale of land for the redemption of the land-tax, the defence was, that Wilson had purchased *bona fide* from the purchaser at the sale. But as it appeared that the statutory requisites of a legal sale had not been complied with, the Court set aside the transaction. As to the purchaser's claim for repetition of the price which he had paid in *bona fide*, the principle

(m) 3 Pat. 579.

(n) See his Lordship's observations in *Aberdeen Ry. Co. v. Blaikie*, 1 Macq. 478.

(o) *Cleghorn v. Elliott*, 10 June 1842, 4 D. 1389. As to this doctrine, see Ersk. 2, 1, 25; and M. Dict. voce "Bona fide Consumption;" *Hamilton v. Chancellor*, 13 Nov. 1833, 12 Sh. 22; *Forbes v. Forbes*, 29 Jan. 1765, 2 Pat. 84.

(p) *York Buildings Co. v. Mackenzie*, 3 Pat. 402; *Elliott v. Wilson*, *supra*; *Jeffrey v. Aiken*, 4 Sh. 724, N. E. 730; *Gillies v.*

MacLachlan, 8 D. 508; *Douglas v. Douglas' Trs.*, 20 July 1864, 2 Macph. 1379.

(q) *York Buildings Co. v. Mackenzie* (2d Appeal), 14 June 1797, 3 Pat. 579.

(r) 1 Macq. 479.

(s) *Kenney v. Brawne*, 3 Ridg. 518, *per* Lord Fitzgibbon; *Baugh v. Price*, 1 Wils. 320.

(t) *Ex parte Bennett*, 10 Ves. 400.

(u) *Elliott v. Wilson*, 1 April 1828, 3 W. & S. 60, affirming 4 Sh. 429, N. E. 435.

of the decision seems to be that he was entitled to recover it in so far as the rightful owner was *lucratus*. On the general question, of the liability of an onerous purchaser, the cases of *Anderson v. The Bank of Scotland* (v) may be consulted; from which (and especially from the last of the two cases) it may be inferred, that a singular successor purchasing or lending money on heritable security, without notice of a trust, is safe, unless the vendor's title be absolutely null. In the class of cases we are considering, the titles may or may not disclose the fiduciary character of the first purchaser. If the circumstances do not disclose a trust, it appears, on the authority of *Fraser v. Hankey*, (x) that the title of an onerous creditor will not be disturbed; and, on the other hand, it may be presumed that a purchaser *with notice* would be bound by all objections competent to be urged against his author.

2053. If the property illegally purchased is part of a sequestrated estate, or of an estate held in trust for creditors, the proper course will be to apply for a warrant for a *resale* of the property, instead of a reconveyance. The only notice we have regarding proceedings of this nature, occurs in the report of *Burt's* case, already referred to. (y) Burt, the trustee on White's sequestrated estate, sold the lands of Arngask by public roup to his own son. Anderson, a competitor in the bidding, objected to the purchase as illegal; in consequence of which, a petition and complaint was presented to the Court by a number of the creditors, praying for the removal of Burt from the office of trustee. Burt thereupon resigned, and the Court found him liable in the expenses of the application, adding a finding to the effect that the purchase was illegal, and "that the said purchase, when objected to, cannot receive the sanction of the Court." With reference to this finding, it may be observed, that the case of a purchase by a trustee, commissioner, or adjudger in bankruptcy, forms, apparently, an exception to the rule which prevails in similar cases, namely, that purchases by trustees are not void *ab initio*. It would rather seem that, inasmuch as the Legislature has declared that it shall not be lawful for any of these persons to purchase, (z) the transaction may be treated as altogether nugatory; though, of course, it would be necessary to bring it under the cognisance of the Court. This view of the matter appears to have been taken in *Burt's* case; for no reduction of the sale was brought, and the new trustee, relying ap-

Resale under
judicial authority,
in what
cases necessary.

(v) *Anderson v. Bank of Scotland*, 29 May 1841, 8 D. 968; and 7 June 1842, 4 D. 1374.

(x) *Fraser v. Hankey*, 9 D. 422, 423.

(y) *Brown v. Burt*, 11 D. 388; *Abercrombie v. Burt*, 13 D. 679.

(z) 19 & 20 Vict., cap. 79, § 120.

CHAPTER LXIV. parently on the declaration of the Court, proceeded to effect a resale of the property, of which Burt became the purchaser again, but at a lower price.(a) It appears from the report of the later proceedings in the *York Buildings* case, after the case went back to the Court of Session, that a new common agent was appointed, and a resale carried through under the authority of the Court.(b)

Measure of damages for illegal purchase by a trustee.

2054. We have seen that a trustee will be liable in damages to the beneficiary for attempting to purchase the estate. In *Burt's* case, the damage was assessed at the difference betwixt the price ultimately obtained and the highest sum offered by a *bona fide* purchaser at the first sale.(c) In *Elias v. Black*, damages were not claimed; the reductive issue for one of the pursuers, a mortgagee, was negatived on the ground that no actual loss was proved to have been sustained.(d) In *Cree v. Durie*(e) an auctioneer was found liable in damages to a bidder, for purchasing the property for himself at the auction.

Remedies of competing purchasers. Reduction of previous offers.

2055. Where there has been competition at an auction, the appropriate remedy may be, neither by a resale of the property, nor yet by a reconveyance from the purchaser, but by an action for enforcing the contract *as a sale to the other bidder*. Thus, where one of two trustees made an offer for the estate, which his co-trustee and the constituent refused to entertain, and the trustee who had made the offer refused to concur in granting a title to a *bona fide* bidder, pretending that the lands had been sold to himself, the Court decerned against him in an action of implement at the instance of his constituent and co-trustee.(f) In another case, where an action was brought by a competing bidder, the Court sustained the relevancy of the summons, which concluded for reduction of all offers subsequent to the first; for declarator that the lands had been effectually sold to the pursuer at the upset price; and for decree ordaining the trustees, exposers of the property, to grant the pursuer a disposition on his making payment of the price.(g) But a preceding offerer will not be bound to take the estate, unless he claims it, where there has been illegal competition; fairness being of the essentials of the contract.(h)

Homologation of the transaction by the beneficiaries; circumstances which constitute homologation.

2056. Purchases by trustees may be validated either by actual

(a) It must be remarked, however, that a sale to a bankrupt's trustee has been sustained after long possession; *Fraser v. Hankey*, 9 D. 415.

(b) *York Buildings Co. v. Bremner*, 6 July 1796; affirmed 19 June 1797, 3 Pat. 586, 587.

(c) *Abercrombie v. Burt*, 13 D. 679.

(d) *Elias v. Black*, 18 D. 1227.

(e) *Cree v. Durie*, 1 Dec. 1810, F.C.

(f) *Brisbane's Trs. v. Crawford*, 3 Feb. 1826, 4 Sh. 422, N. E. 427.

(g) *Faulds v. Corbet*, 21 D. 588, 589.

(h) *Anderson v. Stewart*, 16 Dec. 1814, F.C.

concurrence on the part of the beneficiary, (i) or by homologation. (k) Homologation by a beneficiary of deeds prejudicial to his interests, is of course an effectual bar to any challenge on his part; but the law will not easily presume that a party has consented to injustice; and in order that such consent may be effectual, the party must at the time have been *sui juris*, (l) not ignorant of his rights, (m) and fully aware of the exact nature of the transaction. (n) A mere *non repugnantia* is not sufficient homologation. (o) But a letter authorising the trustee to proceed with the sale, and promising not to challenge it, is binding; (p) and where a bankrupt had been present at the sale of his estate, and had acted as attorney for the trustee when infetment was given him on his purchase, and had concurred with the creditors in a petition for the trustee's exoneration and discharge, the Court unanimously assoilzied the trustee from a reduction at the instance of the heir of the bankrupt. (q) Lord President Boyle, on a review of the English authorities, said that he held it to be established by the decisions, that *long delay* or *acquiescence* was a sufficient ground for refusing the interposition of a Court of Equity to grant relief to a beneficiary against a purchase made by a trustee, or a solicitor in bankruptcy. (r) It may be mentioned that in this case the bankrupt had taken a lease of a part of the estate from the trustee, and had lived on the estate for thirty-nine years before making the challenge. Where the beneficiaries consist of a class of persons, as creditors, or partners of a firm, the sanction of the majority will not bind the rest; (s) at all events, the right of an individual partner, to challenge an illegal sale, cannot be taken away, unless he has had notice of the intention to call a meeting for the purpose of ratifying the transaction. (t)

Homologation by majority only does not bind dissentients.

2057. Lastly, a beneficiary seeking legal redress must make his application within reasonable time. What is to be considered reasonable time will depend entirely upon circumstances, as the Court has no authority to limit the right of action to any period short of the long negative prescription. In *Fraser v. Hankey* (u) relief was refused after *thirty-nine* years of acquiescence; and, as we have seen, great weight was given to the English decisions on the ques-

Mora as a defence to an action of reduction.

(i) *Browning v. Watt*, 25 May 1837, 15 Sh. 999.

(k) *Fraser v. Hankey & Co.*, 9 D. 415.

(l) *Irving v. Tait*, 8 June 1808, 14 F.C. 178; M. "Deathbed," App. No. 6; *Brodie v. Brodie*, 6 July 1827, 5 Sh. 900, N.E. 885.

(m) *Innes v. Duke of Gordon*, 5 July 1822, 1 Sh. Ap. Ca. 169.

(n) *Thorburn v. Martin*, 15 D. 845.

(o) *Taylor v. Watson*, 8 D. 404.

(p) *Duff v. Gorrie*, 23 May 1849, 11 D. 1054.

(q) *Fraser v. Hankey*, 9 D. 415.

(r) 9 D. 427. See chap. 76 (Actions).

(s) *Thorburn v. Martin*, 15 D. 845.

(t) 15 D. 852, *per* Lord Wood.

(u) *Fraser v. Hankey*, 18 Jan. 1847, 9 D. 415; *Robertson v. Scott*, 8 July 1834, 12 Sh. 875.

CHAPTER LXIV. tion of acquiescence. A summary of these will be found in the Lord President's opinion, (x) and in Mr Lewin's work. (y) It is obvious that the defence of *mora* can only be effectually pleaded where the pursuer has been cognisant of the transaction, and in the possession of the means of vindicating his rights. The sale of the estate of Seaton was set aside after Mr Mackenzie had been in possession for thirteen years. (z) Lord Loughborough said it was impossible to impute laches to the Company so long as Mr Mackenzie continued to act as their agent, and while his accounts were unsettled; illustrating his opinion by the case of a gentleman who finds that he has been deceived by his steward, in which case, if he continues to employ him for years, he is not at liberty to call him to account for his former conduct; but if he dismisses him after coming to the knowledge of his conduct, he may do so. (a) In two later cases, twelve years', (b) and even thirty-two years' delay—explained by absence on foreign service (c)—were held insufficient to bar a challenge at the instance of the beneficiary.

(x) 9 D. 425 *et seq.*

(y) Lewin on Trusts, 5th ed. p. 809.

(z) *York Buildings Co. v. Mackenzie*, 8 Pat. 878.

(a) 8 Pat. 401.

(b) *Jeffrey v. Aiken*, 16 June 1826, 4

Sh. 722, N. E. 780; *Taylor v. Watson*, 20 Jan. 1846, 8 D. 400.

(c) *Gillies v. MacLachlan*, 8 D. 487.

CHAPTER LXV.

ADMINISTRATION OF TRUSTS FOR THE EXECUTION
OF DEEDS OF ENTAIL.I. *Execution of the Trust.*II. *Right to Rents and Accumulations of
Interest.*

2058. The only class of duties peculiar to the fiduciary administration of real property not embraced in the previous chapters, is that of the execution of trusts for the management of heritable property, with the view to its ultimate settlement upon heirs of entail. The interposition of a trust in such cases is resorted to, either for the purpose of clearing the estate from incumbrances, or with the view of accumulating the rents for a certain period, and appropriating the proceeds either to the purchase of additional lands to be entailed on the same series of heirs, or in raising provisions for the younger members of the family. In the present chapter we shall notice some points of difficulty in the execution of such powers; and chiefly with reference to the form of the settlement and the disposal of accumulations.

Object contemplated under trusts for the execution of entails.

SECTION I.

EXECUTION OF THE TRUST.

2059. Before proceeding to the fulfilment of so important a purpose as that of the execution of an entail of landed estate, trustees ought to be satisfied not only as to the sufficiency of their title to administer, (a) but also that the estate is in a position to warrant them in denuding with safety, so as to obviate the possibility of any after claims, whether at the instance of heirs or of creditors.

Title of the trustee.

2060. On the subject of liability for entailer's debts, the leading authorities are *Vans Agnew v. Stewart*, and the *Clanranald* case, which is also a leading authority on the nature of the *jus crediti* conferred by marriage-contracts. (b) But the only point in the case

Liability of the estate for entailer's debts.

(a) See chapter 59, as to the trustee's powers.

(b) *Vans Agnew v. Stewart*, 31 July 1822, 1 Sh. (Ap. Ca.) 320; *Herries, Farquhar*, §

CHAPTER LXV.

which we require to notice, is the decision finding that a trust for the payment of debts is not incompatible with the subsistence of a valid entail over the same lands; and that, upon the trustees denuding, after the trust purposes have been fulfilled, the entail will be disburdened of the trust. It is obvious that the payment of the truster's debts must in every case form a preferable burden upon the estate; and the fact that the estate has been exhausted in payment of debts, will be a good answer to an action for implement.(c) On the other hand, the execution of a direction to entail the proceeds of trust-estate will not warrant a reduction at the instance of creditors under the Act 1681, cap. 18; for trustees under a general settlement cannot be regarded as conjunct and confident persons in the sense of the statute, they being as strictly bound to protect the interests of creditors, as to carry into effect the ultimate purposes of the destination.(d) In the event of their neglecting the duty they owe to the truster or his creditors—as, for example, by executing an entail without providing for preferable burdens,(e) neglecting to record the entail,(f) or otherwise putting the estate within the control of the institute without securing the interests of the heirs of the destination,(g)—the trustees incur a personal responsibility for the consequences of their negligence.

Heir-at-law
entitled to exhibition of deed
directing conveyance to his
prejudice.

2061. Where the rights of the heir-at-law are affected by the trust, he is entitled to exhibition of the documents constituting the trustee's title; and it is for the advantage of the trust that he should have an opportunity of considering and vindicating his position as heir; for, in the event of any failure or imperfection in the statement of the purposes, he is legally entitled to the beneficial interest to the extent of such deficiency. It was at one time considered, on the authority of the case of *Cathcart v. Earl of Cassillis*,(h) that as the heir's interest was *prima facie* excluded by a settlement unreduced, he could have no title to sue for exhibition *ad deliberandum*; but this doctrine is overruled by the decision of the Second Division in *Liddell v. Wilson*,(i) where the majority of the judges

Co. v. Brown, 10 March 1838, 16 Sh. 948; *Mitchell v. Tarbutt*, 4 Feb. 1809, F.C. See chapter 83, sect. 2.

(c) *Paul v. Paul's Trs.*, 5 July 1821, 1 Sh. 100, N. E. 101. But see *E. of Leven & Melville v. Cartwright*, 12 June 1861, 23 D. 1088.

(d) *Young v. Darroch's Trs.*, 23 Jan. 1885, 18 Sh. 305.

(e) *Parker v. Anstruther*, 5 Nov. 1853, 16 D. 17; *Cruikshank v. Cruikshank*, 24 April 1845, 4 Bell, 179.

(f) *Brock v. Speirs*, 10 June 1845, 7 D. 863, *per* Lord President Boyle.

(g) See *Dalrymple v. Ranken*, 23 Dec. 1836, 15 Sh. 309, *per* Lord Gillies.

(h) *Cathcart v. Earl of Cassillis*, 1795, M. 3993; *Cathcart v. Kennedy*, Bell, Fol. Ca. 143; and see 31 May 1825, 1 W. & S. 265; *Douglas v. Holmes*, 19 July 1854, 16 D. 1116; *Wilson v. Gilchrist's Trs.*, 11 Feb. 1851, 13 D. 636.

(i) *Liddell v. Wilson*, 19 Dec. 1855, 18 D. 274.

came to the very judicious conclusion, that the heir-at-law is entitled to inspection of the documents found in his ancestor's repositories, were it only for the purpose of ascertaining whether the settlement founded on does in reality exclude his interest, and whether the interest of the trustees be not also excluded by some later settlement in his favour.

2062. As to the execution of powers of entailing, it is proper, in point of style, that the deed should commence with a narrative of the power in pursuance of which it is to be granted. This is the more necessary when the power is conferred by private Act of Parliament, which does not enter the Register of Sasines. The narrative, however, is by no means essential; and it would be immaterial though it were shown in the most conclusive manner that the donee of the power had no recollection of the settlement in which it was contained, and supposed himself to be acting under some other authority. *(k)*

Power ought to be narrated in deed granted in execution of a power.

2063. The execution of trusts for the creation of imperfect entails is liable to be defeated by the operation of the 43d clause of the Entail Amendment Act, *(l)* which, after enacting that entails defective in regard to any one of the prohibitions required by the Statute of 1685 shall be deemed and taken to be invalid and ineffectual as regards all the prohibitions, goes on to declare that, "where any money or other property, real or personal, has been or shall be invested in trust for the purpose of purchasing lands to be entailed, or where any lands are or shall be directed to be entailed, but the direction has not been carried into effect, such trust-money or other property, and such lands, though still unentailed, may be dealt with under this Act in all respects as such lands might have been dealt with if entailed in terms of such trust or directions." The meaning of the proviso evidently is, that where property is held in trust, subject to the conditions of an imperfect entail, the right of the beneficiaries is reduced to that of heirs under a simple destination. The prohibitions are destroyed by the force of the Statute, and the duty of the trustees is to execute an unconditional conveyance in favour of the heirs of the destination, under which the institute will be in a position to defeat the substitution by gratuitous alienation.

Trust for the execution of imperfect entail defeasible under 11 & 12 Vict., c. 36.

2064. It is remarkable, that in the case of *Cameron's Trs. v. Cameron's Trs. v. Cameron.*

(k) Per Lords Brougham and Campbell in *Cunninghame v. M'Leod*, 12 Aug. 1846, 5 Bell, 252, 257. So also, a general disposition or testament is a good exercise of a power of disposal, although the power

be not narrated. See the cases noted in chapter 60, *in fin.*

(l) This section has no retrospective operation; *Urquhart v. Urquhart*, 1 Macq. 658. See remarks on § 26, *infra*.

CHAPTER LXV. *Cameron(m)*—which appears to have been carefully considered—this statutory provision should have been altogether ignored. The truster directed the residue of his means and estate (including his estate of Barcaldine) to be settled upon a series of heirs in the nature of a tailzied destination, but without making use of the word “entail” or its Scottish equivalent; and he further directed his trustees, after the lapse of five years from his death, to dispoise, convey, and make over the residue to the heirs of the destination, “but that always under the denomination and destination above written, and with such restrictions and limitations as may effectually prevent the order of succession above set forth from being altered or destroyed.” The First Division (altering the Lord Ordinary’s interlocutor) found, that under the settlement “the trustees are not directed or authorised to insert in the disposition and conveyance of the estate of Barcaldine, which ought now to be executed by them in conformity therewith, any prohibitions or restrictions against sales of the estate and contraction of debt.” As the 43d clause of the Entail Amendment Act was not pleaded, no opinion was expressed as to whether the trustees were bound to insert a prohibition against altering the succession, as required by the truster; and perhaps the point is not very material, as such a provision, if inserted, would be inoperative.

In dubio, the truster’s direction should be literally carried out.

2065. The mere circumstance that the direction to execute an entail was coupled with conditions *apparently* inconsistent with the maintenance of an effectual and binding settlement under the Statute 1685, cap. 22, or that it proceeded from a party who had himself possessed on a limited title, would not justify trustees in refusing to carry the purpose into execution; for their duty is to carry out the direction as it stands, leaving the validity of the settlement to be determined in an action at the instance of those who have an interest in challenging it.(n) If the direction were ambiguous, it might be necessary to institute an action of declarator for the purpose of ascertaining the terms in which the settlement ought to be conceived. The reports furnish many examples of actions of this nature; and the clauses appropriate to entails executed in pursuance of powers have now to a considerable extent been settled by decision.(o)

Trust to entail estate in favour of the granter’s heirs-at-law.

2066. It is very evident that a direction to trustees to convey

(m) *Cameron’s Trs. v. Cameron*, 14 Dec. 1860, 28 D. 167.

(n) *Graham v. Stewart*, 14 June 1855, 15 D. 558; *Dunlop v. Crawford*, 26 May 1849, 11 D. 1062; *Leny v. Leny*, 28 June 1860, 22 D. 1272.

(o) The Court will not give an opinion upon the terms of an entail already executed; but will grant decree of exoneration in an action directed against the heirs-substitute of entail; *Farquharson v. Earl of Morton*, 15 May 1828, 6 Sh. 796.

under such conditions or fetters, or in such a form of destination as do not, according to the law of Scotland, constitute an effective entail, will not be a sufficient authority to the trustees to execute a strict entail. The mere presumption arising from the use of the word *entail* is not sufficient to overcome a positive direction to execute a deed in terms which are not in accordance with the requirements of the Statute 1685. The principle is illustrated very clearly by the *Dalswinton* case, where the direction was that the estate should be “made over by a deed of entail, according to the formalities necessary in such cases in Scotland, to be enjoyed by my nephew, J. M., and his lawful heirs for ever, in regular succession;” and an action was brought by the institute, to have it declared that he was entitled to a conveyance in fee-simple, on the ground that a destination to heirs whatsoever was not a valid tailzied destination. The trustees, while disputing this proposition, maintained that they were entitled to insert a clause excluding heirs-portioners (which, they said, would make a good entail), and they relied on an expression in the will to the effect that the estate should be “incapable of being divided.” It had been held in former cases that the exclusion of heirs-portioners was a clause of ordinary style, and might be inserted in the absence of any special directions on the subject. But as in this case the intention of the testator was simply to entail the estate on his heirs-at-law, and as the Court were of opinion that a valid entail could only be constituted in favour of a selected class of heirs, the judgment was given in favour of the claim of the institute.^(p)

2067. As trusts to entail are of the class of executory trusts, all matters of form or detail may be left to the trustees’ discretion. A general direction to settle the property in the form of a *strict entail* will be sufficient, and will override other words that might be supposed to point to a simple destination.^(q) In the case of *Forrest’s Trs. v. Forrest*,^(r) a direction to execute a *regular and valid entail* in favour of certain parties in succession, and the heirs whatsoever of their bodies—in the cases of *M’Allister* and *Macpherson*,^(s) that the lands were *to be entailed*, and in other cases, that the titles should be taken in favour of the *same series of heirs, and under the*

Construction of
executory trusts
for the creation
of entails.

(p) *Leny v. Leny*, 28 June 1860, 22 D. 1272. See also *Cameron’s Trs. v. Cameron*, *supra*; *Macalister v. Ferguson*, 9 March 1842, 4 D. 890. In the case of *Gordon v. Gordon’s Trs.*, where the direction was to purchase estate and to entail it on the truster’s son and his heirs whatsoever, the institute was held entitled to demand payment of the residue in money; 2 March

1866, 4 Macph. 501. On the subject of tailzied destinations, see chap. 81, sect. 2.

(q) *Forsyth v. Ferguson*, 14 June 1832, 10 Sh. 646.

(r) *Forrest’s Trs. v. Forrest*, 14 Dec. 1845, 8 D. 804.

(s) *M’Innes v. M’Allister*, 29 June 1827, 5 Sh. 862, N. E. 801; *Macpherson v. Macpherson*, 11 June 1852, 1 Macq. 246.

CHAPTER LXV. *same limitations and irritancies, (t)*—were held sufficient. But the selection of a particular order of heirs, being matter of substance and not of form, is not discretionary; and though it is possible to conceive a power so framed as to leave the selection of the favoured heirs to trustees, no example of such a power is to be found in the reports. If certain heirs are specified in the power, the deed must be executed in favour of them, and of no others.

*Campbell's Trs.
v. Campbell.*

2068. Accordingly, where the direction was to entail lands in favour of four persons and their respective heirs-male, who were substituted successively in the destination, the Court would not allow the trustees to insert a general destination over to the heirs and successors of the institute, although there were expressions indicative of such an intention in the settlement. On this point Lord Cuninghame observed, "Now that there is no necessity for excluding the claims of the Sovereign as *ultimus hæres*, there seems no occasion for an ultimate destination to the heirs-general of anybody; and as such heirs could never be placed *in obligatione*, or so called as to have any *jus crediti*, it appears better to the Lord Ordinary that the destination should stop where the instructions of the truster stop, which would leave the fee-simple succession where it is thought it would be most justly left,—to the heirs whatsoever of the last special substitute."^(u)

Power to entail
not implied in a
testamentary
trust.

2069. A power of entailing will not be implied from incidental expressions indicative of a desire that the estate should remain in the family. For example, in the case of *Duthie v. Duthie*,^(x) while there was no injunction to entail the estate, the trustees were directed to convey to a specified series of substitutes, under a declaration, that if any of the heirs should sell the estates, they should be bound to invest a certain part of the price, the accumulated interest of which should follow the destination of the estates. The Court held that the heirs-substitute took the estate as fee-simple proprietors, and were under no obligation to reinvest the proceeds of the sale of the estate in terms of the trust.

Exclusion of
heirs-portioners
implied in a
general direction
to entail.

2070. It has been settled by several concurring decisions, that trustees are bound to insert a clause excluding heirs-portioners in pursuance of a general direction to execute a "regular and valid entail," or to settle property in "strict entail" on a specified series

(t) *Moncreiff v. Menzies*, 25 Nov. 1857, 20 D. 94.

(u) *Campbell's Trs. v. Campbell*, 12 May 1838, 16 Sh. 1004. In the same case it was found that the heirs-male to be called to the succession in the entail were the

heirs-male of the bodies of their several ancestors, and not the heirs-male general; 16 Sh. 1006.

(x) *Duthie v. Duthie*, 25 Feb. 1841, 3 D. 616; see *Stewart's Trs. v. Stewart*, 20 Dec. 1851, 14 D. 298.

of heirs.(y) In connection with this point we may refer to the case of *Martin v. Kelso*, in which judgment was given by the House of Lords, affirming the decision of the Court of Session on the construction of a power reserved to the heirs-substitutes, "so often as their presumptive heirs were females," so to alter the succession as "to settle the estate upon a younger daughter in preference to an elder daughter." Under this power, the heir in possession was held entitled to call the younger of his sisters in preference to the elder.(z)

2071. In the interpretation of trusts for the execution of entails, the Court acts upon the maxim, that the intention of the truster is to be carried into effect, as distinguished from the rule of strict construction. Thus, a direction to impose fetters upon the "heirs" of the destination is held to embrace the institute; and the distinctions laid down in the *Duntreath*, *Seaforth*, and similar cases, are not recognised. This point was decided in *Forbes v. Forbes*,(a) by the First Division, in an action of declarator instituted by the judicial factor on the trust-estate. In the following year the Second Division sustained an entail to which the objection had been taken, that the trust enjoined the imposition of irritant and resolute clauses upon the whole heirs of entail, without making mention of the institute.(b)

2072. To this principle we may refer the doctrine established by the Court of Session, that a particular enumeration of prohibitions following a general direction, when occurring in a trust, is not taxative but demonstrative. This principle of interpretation here is clearly at variance with the canon of strict construction applied to other branches of entail law; it is perhaps more lax than the ordinary principle of construction in wills, in which the rule is, that words of enumeration are to be held as limiting the operation of a general clause to matters of the same species. But whatever the explanation may be, it is quite settled that the force of a direction to execute an effectual entail is not destroyed in consequence of an incomplete enumeration of clauses prohibitory, irritant, or resolute, coupled with more comprehensive words, such as, "other clauses and conditions necessary and proper for carrying the maker's intention into effect,"(c) or "usual irritant and resolute clauses."(d)

Doctrine of liberal construction of trusts for the execution of entails.

General direction to impose prohibitions and fetters, followed by incomplete enumeration, held effectual.

(y) See *Sprot v. Sprot*, 22 May 1828, 6 Sh. 883; *Forrest's Trs. v. Forrest*, 14 Dec. 1845, 8 D. 304.

(b) *Seton v. Seton*, 1 March 1854, 16 D. 658.

(z) *Martin v. Kelso*, 21 March 1857, 2 Macq. 556, affirming 15 D. 950.

(c) *Stirling v. Stirling's Trs.*, 30 Nov. 1838, 1 D. 130.

(a) *Forbes v. Forbes*, 5 July 1853, 15 D. 809.

(d) *Seton v. Seton*, 1 March 1854, 16 D. 658.

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The latest cases are *Stirling v. Stirling's Trs.*, and *Seton v. Seton*. In both there was a general direction, accompanied with an enumeration of prohibitions, which did not include a prohibition against altering the order of succession. The ground of decision in the last case, as expressed by Lord Cockburn, was "a reluctance to hold the expression of his (the testator's) anxiety about the insertion of the usual irritant and resolute clauses, to imply that he meant to recall the previous direction to make a good entail, which good entail necessarily supposes the operation of a prohibition against altering the destination."

Effect of incomplete enumeration not fortified by general direction to execute a valid entail.

2073. An incomplete enumeration of fetters in a power of entailing, if not fortified by a general direction, is fatal to the intention; for the Court will not permit the insertion of other fetters than those specified in the power.^(e) And therefore, although a direction *to entail* on a certain series of heirs is an authority to execute a strict entail, a direction to entail on such heirs with such prohibitions *as may prevent the order of succession from being altered*, is a mere destination.^(f) And so, where trustees were directed to denude of the residuary estate, with such conditions that the heirs should not dispose of the same, nor alter the succession thereof, either gratuitously or onerously, the Court would not sanction the insertion of a clause prohibiting the contraction of debt.^(g) And where powers were reserved by marriage-contract to make an entail prohibiting alienation and the contracting of debt,^(h) or, as in another case, prohibiting alteration of the succession and contracting of debt,⁽ⁱ⁾ the Court would not allow the omitted prohibition to be inserted in the entail.

Construction of words "same series of heirs" as are specified in existing entail.

2074. It not unfrequently happens that a testator, desirous of bringing new lands within the fetters of an existing entail, leaves a direction to his trustees to entail such lands upon the *same series of heirs*.^(k) A request to this effect is equivalent to a direction to execute a strict entail in their favour. Accordingly, it was held, in a case where the testator, after the execution of the trust-settlement, had executed a second entail altering the destination, that the trustees were bound to follow implicitly the directions of the settlement, and therefore to entail the newly acquired lands on the heirs called to the succession by the first entail.^(l)

(e) *M'Innes v. M'Allister*, 29 June 1827, 5 Sh. 862, N. E. 801; *Macpherson v. Macpherson*, 11 June 1852, 1 Macq. 246.

(f) *Cameron's Trs. v. Cameron*, 14 Dec. 1860, 23 D. 167.

(g) *Cuming's Trs. v. Cuming*, 10 July 1882, 10 Sh. 804.

(h) *Macneil v. Macneil's Trs.*, 27 Jan. 1826, 4 Sh. 898, N. E. 896.

(i) *Macleod v. Macleod*, 1 July 1828, 6 Sh. 1048.

(k) *Douglas' Trs. v. Douglas*, 27 June 1862, 24 D. 1191.

(l) *Macpherson v. Macpherson*, 24 May

2075. In *Mackintosh v. Mackintosh*(*m*) trustees were directed to apply the residue of the testator's estate in purchasing lands, taking the conveyance thereof to the heirs of entail specified in a former deed of entail executed by himself, with the proviso, that "the dispositions and conveyances to be granted to the said heirs of entail, and the infeftments thereon, shall contain, and shall be always with and under the conditions, provisions, restrictions, limitations, exceptions, and clauses irritant and resolute, declarations and reservations, used in the said deed of entail executed by myself." The irritant clause of the entail, there referred to, struck at the contravention of the prohibitions by "all deeds or acts contracted," etc., but did not expressly refer to debts, which rendered it doubtful whether the irritancy could be construed in such a manner as to apply to the contracting of debt. With the view of making the entail more secure, the trustees inserted the word debts in the irritant clause; but the Court found, in an action brought by the heir in possession, that they had exceeded their powers, and reduced the deed in so far as it differed from the style of the original entail. Trustees are not entitled to insert a clause enabling the heirs to take advantage of the provisions of the Aberdeen and Montgomery Acts.(*n*)

Construction of words directing the imposition of same conditions and fetters as in existing entail.

2076. The case of *Graham v. Stewart*(*o*) raised a very interesting question as to the construction of an ambiguous direction. The testator was heir in possession under an entail which he believed to be effectual, but which was afterwards found to be defective in the fencing of the prohibition against alienation; and he directed his testamentary trustees to convey to those succeeding him in the estate certain fee-simple lands,—the conveyance to be "under all the conditions, provisions, and clauses prohibitory, irritant and resolute, of the said entail, so far as the same might be applicable, and so as to form a valid and effectual entail according to the law of Scotland." As it was impossible to settle the fee-simple lands to the same uses as those of the original entail without violating the direction to form a valid and effectual entail according to the law of Scotland, the question came to be, which of the two directions should be preferred? The House of Lords were divided on the point. The majority, consisting of Lord Cranworth, C., and Lord Brougham, ruled that the trustees were bound to execute an effectual entail, although this might have the effect of splitting the

Lord Lynedoch's case.

1839, 1 D. 797. Since the case of *Graham v. Stewart*, *infra*, this cannot be considered a reliable authority.

(*n*) *Gilmour v. Gilmour's Trs.*, 22 Nov. 1855, 18 D. 78.

(*m*) *Mackintosh v. Mackintosh*, 14 Dec. 1855, 18 D. 249.

(*o*) *Graham v. Stewart*, 14 June 1855, 2 Macq. 295, affirming 15 D. 558.

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property. Lord St Leonards, taking, as we think, a sounder view of the intention of the testator, held that there was a positive direction to settle the new estate to the same uses as the existing entail, and that the direction, to make it valid and effectual, meant merely that everything should be done to give to it all the efficacy that a destination conceived in the terms of the original entail was capable of receiving. Lord St Leonards also pointed out, what appeared to have escaped the attention of his colleagues, that an entail defective in the prohibition to alienate, was, in a certain sense, a valid and effectual entail previous to the Entail Amendment Act, i.e., it was valid as a destination, and effectual *inter heredes*. Nor, as he observed, was it likely that the testator, even if he had known of the defect, would have wished the additional lands to be settled differently from the bulk of the property.^(p) It is not likely that the decision will be of much use as a precedent; but the opinions *pro* and *con* are deserving of careful study.

Entail proceeding on defective power may be validated by prescription.

2077. If a trustee appointed to carry out a purpose of entailing, executes a deed which, in consequence of error or mistake, is found to be ineffectual as a strict entail, and possession has been had upon the defective title for forty years, the personal obligation to execute a strict entail will be worked off; and the estate may be acquired in fee-simple;^(q) but it was observed by Lord Jerviswoode, who decided the point, that the trust might have been enforced, had an action for that purpose been brought by any of the substitute heirs of entail within the currency of the prescriptive period.^(r)

Direction to purchase lands to be entailed on specified heirs.

2078. The duties of trustees acting under a direction to convey specific estates are, in the general case, purely ministerial. There is room for the exercise of a larger discretion in the fulfilment of directions to *purchase* land for the purpose of having it settled on heirs of entail. In order to the ascertainment of the truster's intentions, it is important to consider the object he had in view in postponing the execution of the entail until after his death. Some uncertainty in relation to the essential requisites of the entail is usually the determining cause. Amongst such causes of uncertainty, it may suffice to notice the following:—(1) Uncertainty as to the parties who ought to be called to the succession; (2) as to the possibility of making a purchase on favourable terms, or in a suitable situation; (3) the existence of entailer's debts, which, if not cleared off before his death, might render the estate liable to eviction.^(s)

(p) See 2 Macq. 295.

(q) *E. of Eglinton v. E. of Eglinton*, 28 May 1861, 28 D. 1869.

(r) 28 D. 1371.

(s) On the last point, see *Agnew v. Stewart*, 31 July 1822, 1 Sh. Ap. Ca. 320;

2079. An example of the difficulty first referred to is presented in the case of *Cowan v. Turnbull's Trs.*(*t*) The testator's only son was afflicted with insanity; and accordingly, instead of the estate being conveyed directly to him, it was left to trustees to be entailed, along with such lands as they might purchase out of the truster's personal funds, upon the son and his heirs-male, in the event of his restoration to health; but if otherwise, to be entailed on a different series of heirs. In this case the Court had no difficulty in deciding that the entail was not to be executed until the death or convalescence of the lunatic. In the case of *M'Innes v. M'Alister*(*u*) the testator left a sum of money to trustees, to be laid out in the purchase of lands, to be entailed; and to be procured, if possible, in Argyllshire. In the *Lynedoch* case, the new lands were to be procured contiguous to the entailed estate. The desire of procuring conterminous property is not unfrequently the motive for the constitution of such trusts. In such cases the trustees should not be too fastidious in the choice of an estate;(x) and if an eligible estate is found, the trustees ought to acquire it and execute an entail at once, though there is a surplus remaining in their hands, for the heir is not bound to wait for an investment which would exhaust the trust-funds.(y)

Intention inferred from circumstances in cases of ambiguity.

2080. It is, however, necessary to observe, that the truster's directions as to the nature of the subject of purchase,—as to contiguity to other estates, etc.,—must be substantially complied with.(z) In one case, where the direction was to entail lands to be acquired as contiguous to the entailed estate of Hoddam as possible, the Court authorised the purchase of superiorities with part of the funds;(a) and in another case, where trustees had expended the sum of upwards of £60,000 in the purchase of an estate without a mansion-house, it was declared, in an action instituted for the purpose, that the trustees were entitled to expend a balance, amounting to £10,000, in the erection of a suitable residence.(b) On the other hand, it was determined that the purchase of feu and teind duties, payable to the heirs of entail as proprietors of the existing estate, “was not a legal or warrantable application of the trust-funds, but

Explicit directions as to description of lands to be purchased must be followed.

Herries, Farquhar, & Co. v. Brown, 10 Mar. 1838, 16 Sh. 948.

(*t*) *Cowan v. Turnbull's Trs.*, 18 June 1845, 7 D. 872.

(*u*) *M'Innes v. M'Allister*, 29 June 1827, 5 Sh. 862, N. E. 801.

(*x*) *Dickson's Tutors v. Scott*, 2 Nov. 1853, 16 D. 1.

(*y*) *Campbell v. Campbell's Trs.*, 19 Nov. 1852, 15 D. 27, 30, *per* Lord Cuninghame;

Gilmour v. Gilmour's Trs., 22 Nov. 1855, 18 D. 78.

(*z*) See *M'Innes v. M'Allister*, *supra*; *Graham v. Stewart*, 14 June 1855, 2 Macq. 295.

(*a*) *Sharpe, Petr.*, 11 Feb. 1823, 2 Sh. 203, N. E. 180.

(*b*) *Sprot's Trs. v. Sprot*, 11 March 1830, 8 Sh. 712.

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was made in violation of the direction in the trust-deed," which was to invest in the purchase of *lands* in Orkney, or any other place the trustees should judge expedient; and although, in the opinion of the Court, the trustees had acted *bona fide* in making the purchase, they were held liable to account for the capital sum applied in the purchase.(c) Where a statute authorised the sale of the superiorities and part of the lands of an entailed estate for payment of debts, and provided for the establishment of a sinking fund in order to the purchase of lands, equivalent in annual value to the revenues of "such parts of the said entailed lands" as might be sold, it was held to be unnecessary to provide an equivalent for the superiorities.(d)

Where lands are sold for payment of debts, value falls to be reinvested, if personal estate proves sufficient.

2081. Sometimes a truster, being uncertain whether his personal estate is sufficient for the payment of the debts which he may leave unpaid, conveys his estates in general terms to trustees, in trust for the payment, in the first place, of debts and legacies, with an ultimate direction to the trustees to make over the residuary estate, or such part thereof as they may not find it necessary to dispose of for answering the primary purposes, to a certain series of heirs under a settlement in strict entail. In a case of this description, the trustees, in the due administration of the estate, had found it necessary to sell part of the heritable estate, for which they obtained upwards of £7000; but having afterwards recovered a personal debt of £13,000, of the existence of which they were not previously aware, the question arose, whether the money belonged to the truster's representative as personalty, or to his heirs of entail? It was held that, as the sale of the heritable estate was the result of an error, a sum equal to the price of the subjects erroneously sold fell to be invested in the purchase of other lands for the benefit of the heirs of entail.(e)

Application of trust-money, under Entail Amendment Act, to redemption of land-tax, etc.

2082. Under the 26th and 27th sections of the Entail Amendment Act(f) the heir entitled to succeed to money held in trust, to be entailed on the same series of heirs as are called to the succession by an existing entail, may, if he be not entitled to acquire the fund in fee-simple, apply to the Court for authority to lay out

(c) *Pollexfen v. Stewart*, 14 July 1841, 8 D. 1215. Moveable property, heirlooms, etc., are not proper subjects of an entail; *Baillie v. Grant*, 21 May 1859, 21 D. 838; *Cameron's Trs. v. Cameron*, 14 Dec. 1860, 23 D. 172. See chapter 31, sect. 1.

(d) *Lovat v. Fraser*, 11 March 1842, 4 D. 1062. Where trustees were directed to lay out the trust-funds in the purchase of lands in England, and power was also

given to pay off debts affecting the truster's estates in Scotland, they were held entitled to recall the money which had been applied to the latter purpose, and to purchase an estate in England; *Marchioness of Annandale v. Marquis of Annandale*, 18 Feb. 1755, 6 Pat. 697.

(e) *Stainton's Trs. v. Topham*, 10 Jan. 1868 (2d Division).

(f) 11 & 12 Vict., cap. 36, § 26.

the money in extinction of entailer's or other debts, in redemption of land-tax, or in repayment of money expended in permanent improvements. To remove doubts(*g*) the operation of this provision was, by 16 & 17 Vict., cap. 94, sect. 8, extended to trusts which had been partially implemented. In construing these enactments it has been held, that if the trust excludes *one* of the heirs of the existing entail, although the effect of such exclusion is only to propel the succession for one life, the trust cannot be held to be for the benefit of "the same series of heirs," and therefore the funds are not applicable to the extinction of burdens.*(h)*

2083. An important extension of the jurisdiction of the Court in relation to entailed money is contained in the 8th section of the Trusts (Scotland) Act 1867.*(i)* "The Court may, on petition by the trustees, and after such intimation and inquiry as may be thought necessary, authorise the trustees under any trust-deed to apply the whole or any part of trust-funds which they are empowered or directed by the trust-deed to invest in the purchase of heritable property to the payment or redemption of any debt or burden affecting heritable property which may be destined to the same series of heirs, and subject to the same conditions as are by the trust-deed made applicable to the heritable property directed to be purchased; provided always that such application shall not be inconsistent with the other provisions of the trust-deeds."

Application of entailed money, under the Trusts Act, to payment of debts affecting the estate.

SECTION II.

RIGHT TO RENTS AND ACCUMULATIONS OF INTEREST.

2084. The points to be determined are, the term at which the investment may lawfully be made, and the disposal of the rents and produce of the estate arising either before or after that period. It is a general rule, that the fruits of the estate belong to the heir, or to the party who would have been heir in possession from the time at which an investment might lawfully have been made, although in point of fact no eligible investment has been obtained. Prior to that period the interest of the heirs of entail does not vest, and the fruits of the subject accordingly fall to be added to the capital.

Questions stated.

2085. From the decisions to which we are about to refer, it will be seen that three cases have been distinguished:—(1) If accumulation is not expressly or impliedly directed, the interest vests in the institute or first taker *a morte testatoris*. (2) If the direction

Accumulations, either (1) not directed, or directed either (2) indefinitely, or (3) for a definite period.

(*g*) See Pet. *Hamilton*, 13 July 1852, 14 D. 1003; Pet. *Maxwell*, 27 Feb. 1857, 19 D. 571.

(*h*) Pet. *Earl of Strathmore*, 8 Dec. 1858, 21 D. 68.

(*i*) 30 & 31 Vict., cap. 97.

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merely involves accumulation until a suitable investment is found, the presumption holds that the truster intended to benefit all his heirs equally, *(k)* and the trustees are therefore to invest within a reasonable time, which is in practice restricted to *one year* from the death of the testator. (3) If the settlement directs accumulation for a specified time, or until a certain sum has been realised, or until the primary purposes of the trust have been fulfilled, the trustees must accumulate until the expiry of the term appointed, or until the arrival of the time at which accumulations are stopped by the operation of the Thellusson Act. *(l)*

Heir entitled to accumulations, unless the contrary is directed.

2086. (1) The rule, that the heir is entitled to the whole unappropriated proceeds of an entailed succession, was first laid down by Lord Jeffrey, and adopted by the Court, in the case of *Howat's Trs.* *(m)* The testator directed his trustees to employ "all the residue of his personal estate and effects," after satisfying legacies, etc., in the purchase of lands in the counties of Kirkcudbright or Dumfries, "so soon as they can meet with a purchase of an estate they think eligible;" and Lord Jeffrey, distinguishing the case from *Lord Stair's* case, *(n)* ruled that where there was no direction to the trustees to invest interests and proceeds as well as the principal, the trustees could not accumulate even during the first year; observing, that though they must have a reasonable time allowed, during which they should not be liable in actual payment or performance, yet, on an ultimate settlement of accounts, the heir was entitled to the whole interest and profits actually drawn after the testator's death and not exhausted by any preferable application. *(o)* In a later case, where trustees were by the terms of a trust-settlement and codicil bound to invest in the purchase of land to be entailed within three years after the testator's death, or as soon as the sum at their disposal should amount to £30,000, and the residue at death amounted to that sum, the Court, reversing Lord Mackenzie's judgment, gave the interest accruing during the three years in question to the first taker under the settlement. *(p)*

(k) Per Lord Redesdale in *Stair v. Stair's Trs.*, 2 W. & S. 619. Some of the judges in the Court of Session gave an opinion that the *only* object of Scotch entailers was *the perpetuation of their own names and arms*—a supposition which cannot be proved; and which is at any rate inadmissible in the construction of trust-settlements, being at variance with the maxim, that the settlor is presumed to have contemplated the benefit of the grantee.

(l) Chapter 16, sect. 8.

(m) *Howat's Trs. v. Howat*, 17 Feb. 1838, 16 Sh. 622; *Campbell's Trs. v. Campbell*, 30 June 1838, 16 Sh. 1253, per Lord Jeffrey; *Campbell v. Campbell*, 11 March 1830, 8 Sh. 713.

(n) *Stair v. Stair's Trs.*, *infra*.

(o) 16 Sh. 625–6.

(p) *Wilson v. Paul*, 11 July 1833, 11 Sh. 995.

2087. The case of *Macpherson*(*q*) was attended with difficulty, from the circumstance that the direction to acquire and entail lands in Scotland was contained in an English will. The Court of Session were of opinion, that the right to the intermediate proceeds, prior to actual investment, fell to be determined according to the *lex loci contractus*, and obtained an opinion of English counsel, to the effect that accumulation was permissible for one year; and judgment was given accordingly. But, on appeal, Lord St Leonards held that the English case of *Sitwell v. Bernard*,(*r*) on which the opinion was founded, applied only to cases like *Lord Stair's* case in the Court of Session, where accumulation was expressly directed; and on a review of all the existing authorities, he decided, on principles equally applicable to both systems of jurisprudence, that there could be no accumulation *ex lege*. "The rule on which the Court proceeds," said his Lordship, "is, that this property was impressed by the will itself with the character of real estate, and that, being so impressed, it became real estate by construction of law:—and in my apprehension it must be treated as if it were such at the moment of the testator's death." The opinion of Lord Brougham was to the same effect.

CHAPTER LXV.

Doctrine of the English law raised in *Macpherson's* case.

This case distinguished from *Sitwell v. Barnard*.

2088. (2) The import of the rule laid down by the Court of Appeal in *Lord Stair's* case(*s*) has been so much canvassed,(*t*) that

Indefinite direction to accumulate, how construed. *Lord Stair's* case.

(*q*) *Macpherson v. Macpherson*, 11 June 1852, 1 Macq. 248, reversing 12 D. 486.

(*r*) *Sitwell v. Bernard*, 6 Ves. 520. There seems to have been some little fluctuation of opinion on the point amongst the English judges. Lord Eldon, who decided *Sitwell v. Bernard*, evidently intended to establish a precedent for *cutting down* accumulations to one year, in cases where accumulation for a longer period was not enjoined. He never intended to sanction accumulation even of the first year's interest, as a rule of law, apart from the testator's will, as appears from the cases of *Angerstein v. Martin*, Turn. & Russ. 282, and *Hewitt v. Morris*, Turn. & Russ. 242, where his Lordship gave the liferenter the income as from testator's death. The case of *Stott v. Hollingworth*, 3 Madd. 161, where the first year's income was given to the tenant for life, although there was no direction to accumulate, is not law, and was overruled in *Macpherson v. Macpherson* by Lord St Leonards, 1 Macq. 250. The later cases are in perfect accordance with the

opinion of the Court of last resort, as stated in the text. We would refer especially to *Dimes v. Scott*, 4 Russ. 195, decided by Lord Lyndhurst; to *Taylor v. Clarke*, 1 Hare, 161, 11 L. J. Ch. 189; and *Douglas v. Congreve*, 1 Keen, 410, 6 L. J. Ch. 51, where there was no direction to accumulate, and Lord Langdale said, "It appears to me more likely to have been the intention of the testator, that, until the lapse of such convenient time as might be allowed to the executors to make the conversion directed by the will, the tenant for life should enjoy the interest of the residue as actually invested;" 6 L. J. Ch. 55.

(*s*) *Stair v. Stair's Trs.*, 2 Sh. 205, N. E. 182; 29 Mar. 1825, 1 W. & S. 72; second action, 4 Sh. 488, N. E. 488; 24 May 1826, 2 W. & S. 414; and 5 Sh. 476, N. E. 449; 19 June 1827, 2 W. & S. 614.

(*t*) See Lord Jeffrey's note, 16 Sh. 624; and Lord Curriehill's note in *Dickson's* case, 16 D. 8, with Lord Colonsay's remarks thereon, p. 5.

CHAPTER LXV. it seems necessary, in referring to it, to state the exact points that were decided, in the terms of the judgments. The direction was, "to lay out the residue of the trust-funds, *and interest and proceeds thereof*, in purchasing lands, . . . to annex the same to my entailed estate by taking the rights and securities so to be purchased to the same heirs of tailzie," etc. The trustees having purchased lands to a considerable extent in the course of the first three years after the testator's death, an action was brought by the heir, concluding to have it found that he had right to the interest of the balance subsequent to the realisation of the fund.⁽ⁿ⁾ The Court of Session assoilzied the trustees from this claim, "reserving to the pursuer to be heard, in case any improper or unnecessary delay take place, whether he may not then be entitled to claim the interest of the residue of the funds not vested," etc. The House of Lords affirmed this judgment; but with a strong intimation of opinion that the grounds on which it had been rested could not be supported, and that a limit should be put to the period of accumulation.^(x) A second action was then brought, founded on the precedent of *Sitwell v. Bernard*,^(y) concluding that the heir was entitled to the interest from and after 1st June 1822, being twelve months after the death of the settlor. The Court again assoilzied the trustees, in respect there was no precedent for awarding intermediate profits to the heir, "and also in respect there has been no undue delay upon the part of the trustees in laying out the trust-funds as appointed by the truster." The case was remitted, on the motion of Lord Gifford, who pointed out the expediency of laying down a general rule on the subject of accumulations.^(z) The Court, however, by a large majority, adhered to the opinions formerly expressed by the judges; chiefly on the ground that the trustees had a discretionary power as to time, with which the Court could not interfere, except in a case of manifest delay.

An indefinite purpose of accumulation is satisfied by adding one year's interest to the principal.

2089. The case was afterwards argued before Lords Redesdale and Eldon, who embodied the judgment of the House in an opinion, by which it was declared that the appellant, Lord Stair, "was and is entitled, and that the several persons who shall from time to time succeed him in the entail of the said lands of Calquhasen and others, according to the course of such entail, will be from time to time entitled to the interest and proceeds of the whole of the trust-funds which have arisen from the end of the twelve months usually allowed, according to the course of the law of Scotland, for

(u) 2 Sh. 205, N. E. 182.

(x) 1 W. & S. 72.

(y) *Sitwell v. Bernard*, 6 Ves. jun. 520, 544.

(z) 2 W. & S. 414.

payment of debts and legacies, and which shall arise until the whole of the capital of the said trust-funds, with the interest and proceeds thereof, which have accrued prior to the expiration of the said twelve months, shall have been applied in the purchase of lands, according to the directions contained in the said trust-disposition.”(a) Lord Eldon, who explained that, in deciding the cases of *Sitwell* and *Angerstein*,(b) he went on presumed intention, and not upon any maxim peculiar to English jurisprudence, sums up his opinion in an affirmative answer to the following question : —“ The question here is, it being the clear intent of this testator to give a beneficial interest to every one who was to succeed to his real property purchased in the counties in which he directed the purchase to be made,—whether the mere insertion of these words ‘ interest and proceeds,’ may not be satisfied by a much more limited construction of them than that construction which would make them mean interest and proceeds as they accrue, and may be received, until the money shall be so laid out.”(c)

2090. In applying the rule of *Lord Stair’s* case, as to the disposal of intermediate proceeds, to a settlement which directed that, until such time as the trustees might find it convenient or proper to make the purchase therein expressed, the interest of a certain fund *should accumulate*,(d) Lord Colonsay expressed his concurrence in the view that the restriction of accumulation to the period of one year was not an absolute rule of law, but rather of practice, grounded upon the presumed intention of the testator that his heir should enjoy the benefit of the fund. The trustees had always a certain discretion as to the time of making the purchase ; and while it would require a strong case to induce the interference of the Court to compel the literal fulfilment of the truster’s directions, they might give relief in another way ; on the principle that, although the trustees were giving way to fastidiousness in the selection of an estate, the heir was not to suffer loss from that mode of administration. Observing that accumulation for some period was clearly contemplated, his lordship proceeded to inquire whether a year was a reasonable period :—He could easily conceive a case in which it would not be a reasonable period ; but in ordinary circumstances it was so. There were two half-years’ interest to be added to the principal sum, which was a sufficient accumulation to satisfy

Rule that one year a reasonable period for accumulation : whether absolute.

(a) 2 W. & S. 615.

(b) *Sitwell v. Bernard*, *supra* ; *Angerstein v. Martin*, Turn. & Russ. 232.

(c) 2 W. & S. 624.

(d) *Dickson’s Tutors v. Scott*, 2 Nov. 1853, 16 D. 1 ; and see Lord Ivory’s remarks in *Moncreiff v. Menzies*, 25 Nov. 1857, 20 D. 101 : “ The trustees could not have insisted on holding office indefinitely,” etc.

CHAPTER LXV. the words of the deed, where there was no evidence of any great desire to accumulate.(e)

Specialty where period of accumulation specifically fixed by the settlement.

2091. (3) If, in a settlement expressly directing accumulation, the distribution is postponed to a certain period, the Court will not interfere with the accumulation enjoined by the settlor, however capricious or unreasonable the direction may be. In the *Strathmore* case(f) the avowed object of the truster was to exclude his brother and two other persons from the succession; and for that purpose he conveyed all his unentailed estates, with all his personal property, to trustees, who were directed to *apply, lay out, and invest* the rents and profits of the estates and other property in the purchase of government or heritable securities, until an opportunity offered of applying the same to the purchase of lands contiguous to his other estates, to be entailed by the trustees; and he declared that the *trust should subsist* for thirty years after his death, and until the death of the longest liver of the three parties who were excluded from the succession. The trust was sustained as regards the appropriation of the rents of heritable estate, which at the date of the grant (1815) were excepted from the operation of 39 & 40 Geo. III., cap. 98.

Effect of Thellusson Act as extended by 11 & 12 Vict., c. 36.

2092. In *Keith v. Lord Keith's Trs.*(g) one of the purposes of the settlement which was in question was, to enable the trustees to hold estates specifically conveyed, as well as those which they were directed to purchase, until the death of the truster's daughter, or the birth of an heir. Meanwhile, the trustees were directed to *levy and accumulate*, and lay out the same in the purchase of lands, to be entailed. The question was as to the application of rents levied after the passing of the Entail Amendment Act; the trust having by that time exceeded the limits prescribed by the 39 & 40 Geo. III., cap. 98, the provisions of which were by the Entail Amendment Act(h) made applicable to the proceeds of heritable property in Scotland. The Court ruled that the provisions of the Act were not retrospective.(i)

Period of accumulation may be made dependent on the extinction of debt, etc.

2093. Where the execution of a purpose of entailing is, by the terms of the settlement, postponed until the completion of certain primary purposes, such as the payment of debts, legacies, or annuities, and the intermediate rents are directed to be added to the general fund, the purpose of accumulation is held to terminate on the completion of the primary purposes; and the heir entitled to

(e) 16 D. 5.

(f) *Earl of Strathmore v. Strathmore's Trs.*, 23 March 1831, 5 W. & S. 170; *Keith v. Keith's Trs.*, *infra*.

(g) *Keith v. Keith's Trs.*, 17 July 1857.

19 D. 1040; see 1044.

(h) 11 & 12 Vict., c. 36, § 41.

(i) 19 D. 1057 *et seq.*

succeed has then a vested liferent interest in the annual proceeds, so that, if he die before a purchase has actually been made, his interest in the profits accruing subsequent to the period of distribution will transmit to his representatives.^(k) And any interest or annual revenue directed by the Court to be paid over to the heir, on the ground that the period of investment had arrived, vests in the heir as personalty, and is chargeable as such with legacy-duty.^(l)

2094. If the entail is to be executed in favour of the heir *who shall have attained majority* at the appointed period, it is held as executed as soon as a purchase has been made; and it is immaterial that the heir entitled to succeed at the actual date of the *purchase* is a minor, if there was an heir who had attained majority at the earliest period when the purchase might have been made.^(m) Beneficiaries surviving the period of vesting have the same rights as heirs of entail in the matter of burdening the fund with provisions to widows and children, etc.⁽ⁿ⁾ And it has been decided that where, during the lifetime of an heir, the period had arrived at which a purchase *might* have been made, but was not—the trustees having in such cases a discretionary power to accumulate for one year—the heir, dying during the year of accumulation, was entitled to grant a bond of annuity to his widow, under the Aberdeen and Entail Amendment Acts; for the application of the rents to the purpose of accumulation is not regarded as a burden extinguishing the free rental, seeing that the accumulations go to enhance the capital.^(o)

2095. Where trustees invested with a discretionary power of accumulation had, after keeping up the trust for a lengthened period, ultimately made an investment which more than exhausted the original fund, they were found not to be entitled to retain the surplus accumulation as a nucleus for a second purchase; and the balance, amounting to £2000, was directed to be paid over to the executors of the heir who would have succeeded had the purchase been made when the settlement came into operation.^(p)

2096. If by the terms of the settlement debts and expenses are

Vested rights of the beneficiary before the execution of a conveyance in his favour.

Where purchase exhausts the capital, how the surplus revenues are to be applied.

Debts charged upon capital, not to be paid out of revenue.

^(k) *Stewart v. Traill*, 16 June 1837, 15 Sh. 1153; *Dickson v. Dickson*, 8 June 1855, 17 D. 814; *Ogilvie v. Boswell*, 27 Jan. 1852, 14 D. 363; 15 July 1856, 19 D. (Ap. Ca.) 7; 28 Jur. 646.

^(l) *Adv.-Gen. v. Stair's Tr.*, 15 July 1850, Exch. Rep.

^(m) *Stewart v. Traill*, *supra*; *Stainton v. Stainton's Trs.*, 25 Jan. 1850, 12 D. 571.

⁽ⁿ⁾ *Stainton v. Stainton's Trs.*, *Dickson v. Dickson*, *supra*.

^(o) *Dickson v. Dickson*, *supra*. See 11 & 12 Vict., c. 36, § 29.

^(p) *Moncrieff v. Menzies*, 25 Nov. 1857, 20 D. 94.

CHAPTER LXV. made a burden on the fund for investment, the trustees cannot charge them upon the intermediate profits; but as such charges form a proper burden on the fund as at the testator's death, they may be deducted from the capital before estimating the amount of the profits available for investment. (*q*)

(*q*) *Campbell v. Campbell*, 30 June 1838, 16 Sh. 1251, see 1257.

CHAPTER LXVI.

ADMINISTRATION OF CHARITABLE AND QUASI-CORPORATE TRUSTS.

I. *Duties of Trustees of Charities.*II. *Powers of the Trustees.*III. *Liabilities, and Remedial Jurisdiction of the Court.*IV. *Appointment of New Trustees.*

2097. In this chapter we have to consider a very important class of testamentary provisions, which, though the creation of individuals, are properly distinguished from ordinary private trusts, regard being had to their objects and contemplated endurance. The rules affecting these trusts are almost entirely dependent on the common law, the Legislature having abstained from that interference with Scottish charities which is so marked in connection with those of England. Indeed, it would appear that, with the two exceptions, if such they are, to be immediately mentioned, the only Statute dealing with them at all is the Act 1663, cap. 6, "against the inverting of pious donationes," which, on the narrative of the frequent inversion or misappropriation of grants to colleges, schools, hospitals, and other pious uses, provides that those intrusted with these grants shall be accountable to the beneficiaries, and that actions shall be competent at the instance of the beneficiaries, or the bishops and ordinaries within whose diocese the mortifications(a) lie, to compel them to administer the trusts according to the terms of the grants, and over and above, to account for the ordinary profits of every year's intromission "at the rate allowed by the laws of the realm." The Trustee Act of 1861, as explained by

Charitable and public trusts regulated mainly by the common law.

Statute 1663, c. 6.

(a) *Mortification* was of old the kind of tenure by which lands were held when they were granted to religious houses or for other pious uses. These grants were made *ad manum mortuam*,—i.e., as Prof. Menzies explains, "to a hand that could neither fight for the superior, nor transfer the grant." At the Reformation the ten-

ure was abolished, and all lands mortified for superstitious purposes were annexed to the Crown. Those granted for charitable and other benevolent purposes, however, were not annexed, and lands may still be mortified for any lawful purpose, to be holden feu or blench.

CHAPTER LXVI. 26 & 27 Vict., cap. 115, applies to trustees of charitable institutions; it being expressly provided by § 2, that the expression "gratuitous trustees in the first-mentioned Act shall extend to gratuitous trustees who are appointed or who hold *ex officio*." In a recent case (b) it was made matter of question whether, under the 19 & 20 Vict., cap. 79, §§ 164–166, private trusts could be brought under the superintendence of the Accountant in Bankruptcy, so as to obtain, at the public expense, a periodical audit of the trust-accounts and exoneration of the trustees. The Court did not decide the point, but the opinions expressed were adverse to the competency of such a procedure.

Bankruptcy
Act, 1856.

SECTION I.

DUTIES OF TRUSTEES OF CHARITIES.

Duty of the
trustee to carry
out the charit-
able or public
purpose of the
trust.

2098. The primary duty of the trustee is, of course, to carry out the charitable intention according to the spirit and fair meaning of the bequest. A good illustration of this is supplied by the case of the *Magistrates of Edinburgh v. The Professors of the University*, (c) relative to the trusts created by General Reid in favour of the University. The General conveyed his personal property, amounting to about £60,000, to trustees, "in the first place, for establishing and endowing a Professorship of Music in the College and University of Edinburgh, where I had my education, and passed the pleasantest part of my youth; and in the next place, for the purpose also, after completing such endowment as hereinafter is mentioned, in making additions to the library of the said University, or otherwise in promoting the general interest and advantage of the University, in such way and manner as the Principal and Professors thereof for the time being shall, in their discretion, think most fit and proper." The only express provision in the trust-deed, as to the endowment of the chair, was a declaration that the salary of the Professor should not be fixed at less than £300. The Senatus, who were the trustees, fixed the salary at the minimum, and admitted their obligation to set apart and invest a fund sufficient to meet it; but they contended that they were entitled to dispose of the remainder of the fund bequeathed, as falling under their discretionary power of administration, for behoof of the University. The Court refused to sanction this contention. Lord Fullerton said, "The whole settle-

(b) Pet. *Tweedie*, 22 Jan. 1858, 20 D. 438. v. *Mags. of Edinburgh*, 15 Feb. 1864, 2 Macph. H. L. 7, 4 Macq. 603, reversing 22 D. 1222; also 5 Macph. 115; *Presbytery of Dundee v. Mags. of Dundee*, *infra*, 20 D. 849, 23 D., H. L., 14, 1 Macph. 473.

(c) *Mags. of Edinburgh v. Principal and Professors of University of Edinburgh*, 20 June 1851, 13 D. 1187. See also *Clephane*

ment must be read together, and read, if possible, so as to support rather than frustrate the intention of the testator." Acting on this principle, their Lordships reviewed the trust-deed in great detail; and being of opinion that, as the Lord President Boyle expressed it, "General Reid, an enthusiastic lover of music, and himself a composer, had primarily in view the establishment on a permanent foundation of a Professorship of Music in the University of Edinburgh, where none before existed," they held that the Senatus would not discharge themselves of their trust by simply providing a fund for the payment of the Professor's salary, but that they must, in addition, set apart and invest funds sufficient to provide the Professor with the means of efficiently teaching the science of music. In consequence of this decision, a class-room was built and apparatus procured for the Professor of Music, at the expense of several thousand pounds in addition to the sum set apart to secure the salary. Mr Lewin notices (*d*) a case very similar to this, in which, "where trustees were directed to apply the rents towards the necessary finding a master, and for the pains of such master," and "the trustees applied part of the revenue towards rebuilding and repairing the school-room and school-house, it was held to be a good pursuance of the trust, because a school-room and house were necessary; and if these were not provided by the trustees, they must have been provided by the master himself, and so it was in effect applied for the pains of the master." (*e*)

2099. It has been settled by a train of decisions, that although for a long series of years trustees have acted upon a construction of the trust-deed which turns out to be erroneous, that will not entitle them to continue to act upon it after the error is discovered. (*f*) In the old case of *The College of Aberdeen v. The Town* (*g*) it was so held, and the doctrine has scarcely been doubted since. Where a bequest was left by a lady in England to a particular district of the parish of Cardross, to be under the management of "the patrons or overseers of the poor of said place," it was held that it fell to be administered by, *inter alios*, the whole heritors of the parish, even although for eighty years none but the heritors in the particular district had acted under the trust. (*h*) In this case, the Court held that to certain effects a parish is a corporation, consisting of the minister, heritors, and kirk-session, all of whom are entitled to vote

Purposes of charitable trust not controlled by adverse usage.

(*d*) Lewin on Trusts, 5th ed. p. 404.

(*g*) *Coll. of Aberdeen v. The Town*, 24

(*e*) *Att.-Gen. v. Mayor of Stamford*, 2 Swans. 592.

June 1675, 1 Br. Sup. 552 and 787.

(*f*) See, in addition to the cases noted *infra*, *Cairncross v. Lorimer*, 3 Macq. 882, *per Lord Kingsdown*.

(*h*) *Earl of Galloway v. Kirk-Session of Dalry*, 22 Feb. 1810, F.C.

CHAPTER LXVI. *per capita*. It was on this footing that they held the whole heritors entitled to participate in the administration of the bequest. It is probable that such a bequest would now, under the provisions of the Poor Law Amendment Act,⁽ⁱ⁾ fall under the management of the Parochial Board of the parish.

Quære, as to effect due to usage in relation to matters of administration.

2100. In the case of *Leslie v. Black*(*k*) the Court appear to have ignored the principle with which we are at present dealing. Under a deed of mortification, certain persons were the patrons along with "the minister and remanent members of the kirk-session of Largo." For a very long period the kirk-session voted collectively by a delegate. Having claimed a right to vote *per capita*, the Court refused to allow them to do so, as the report states, "being chiefly influenced by the long consuetude." This decision, although it only went to affect the machinery of the trust, without touching the beneficial interest, seems erroneous in principle; and the precedent has not been followed.

Case of the Ramsay bursaries.

2101. For example, in 1681, a person of the name of Ramsay mortified certain lands for the education and entertainment of *three* youths for a certain number of years in the United College of St Andrews; and he provided, that "what shall be over and above the entertainment of the foresaid youths and payment of their regents, it shall be bestowed entirely upon the said youths in three proportions, for buying of books and other necessaries." In 1784, the value of the mortified lands having considerably increased, the patron of the bursaries, Sir Alexander Ramsay, entered into an agreement with the Principal and Professors of the United College, to the effect that the number of the bursaries should be increased so as to give one for every £20 of income from the mortification. This agreement was acted on down to 1840, when there were *thirteen* bursars on the fund, each drawing £20 a year. In 1840, Sir Alexander Ramsay, the then patron, brought a reduction of the agreement,^(l) on the ground that it was in violation of the will of the founder. The College pleaded prescription and personal bar, and also that the agreement was no more than a wise and beneficial adaptation of the original regulations to the improved state of the mortified fund; but the Court refused to listen to these pleas, and, setting the agreement aside, found that the whole revenues must be expended on *three* bursars. The Lord Ordinary (Cockburn) observed in his note, that he could not "bring himself to think that the doctrine, either of prescription or acquiescence, or even of positive and personal ratification, can apply to such a case.

(i) 8 & 9 Vict., c. 88.

(k) *Leslie and Black*, 9 June 1814, F.C.

(l) *Sir A. Ramsay v. The United College*

of St Andrews, 7 June 1842, 4 D. 1866.

These doctrines may affect parties managing *their own interests*, CHAPTER LXVI. but they do not apply to *trustees*—the responsible managers of a private charity instituted for public purposes, who can claim no right to violate their duty in time to come by having violated it in time past." Lord Fullerton said, "It is impossible to hold that any lapse of time can sanction and secure the continuance of a violation of duty by the administrators of a trust."*(m)*

(m) The difficulties which are inseparable from the consideration of this class of cases have been increased by the distinction taken, in the recent case of *Baird v. The Magistrates and Council of Dundee*, 5 Feb. 1862, 24 D. 447, 1 Macph. H. L. 6, between questions of title and questions of trust. To explain this decision, it is necessary to observe, that in a suit previously instituted to enforce the administration of certain property and funds, entitled the Hospital Fund of Dundee, the House of Lords, affirming the judgment of the Second Division of the Court of Session, found that the revenues of this fund were applicable to certain purposes, inclusive of the support of the ministry in Dundee, but with a declaration that the subjects called "Monorgan's Croft" had been purchased A.D. 1646, with money left by Robert Johnston as a legacy to the Provost and Bailies of Dundee, "for the yearly maintenance of the aged and impotent people of the town of Dundee;" 24 July 1861, 28 D. H. L. 14, 4 Macq. 228, affirming in part 20 D. 849. An action having been raised to determine whether the revenues of this croft were not still subject to the trusts of Johnston's will, the Lords of the First Division (*dissentiente* Lord Deas) held in point of fact, that the legacy had never been intromitted with by the *Provost and Bailies*, the trustees of the legacy, but by the *Provost, Magistrates, and Town Council*, who (but whether in their corporate capacity, or as trustees of the hospital fund, is not quite clear) took possession of the money, and invested part of it in the purchase of Monorgan's Croft, taking the title in the name of the Hospital Master of Dundee, "for the special use, behoof, utilitie, and profit of the poor of the said hospital." Their Lordships decided, that in consequence of the appropriation of this fund to the purposes of the hospital for two centuries without challenge, the right to sue for fulfilment

of Johnston's trust had been cut off by the negative prescription; and they were also of opinion that the title of the Hospital Master had been validated by the positive prescription; so that the beneficiaries could have no relief either by personal action, or against the estate. This decision could only be supported on the ground that the title of the present administrators of the charity was *in its inception* clear from the trusts of Robert Johnston's will. For, suppose the legacy had been left to the Provost, Magistrates, and Council, as trustees for the purposes of that will, it is clear that in such a case the parties interested in the *hospital* trust, having no written title, legal or beneficial, to the subject, could not object to the contemplated reconversion of its revenues to their legitimate uses; while the legal proprietors, the corporation, being confessedly mere trustees of the estate, would be barred by want of interest from founding on any prescriptive possession adverse to the interests of their constituents. The judgment on appeal, finding that the trust might be enforced, has been generally approved.

The Statutes relative to prescription apply to questions as to the *possession of the legal estate*. In that view, the Provost and Bailies would be excluded from any right to dispossess the Provost, Magistrates, and Town Council, whose title as legal proprietors and administrators of the charity was certainly fortified by prescriptive possession. But supposing the transaction (the conveyance of Monorgan's Croft to the hospital trustees), to have been truly a devolution of the trust to the latter body, it is clear that the parties assuming to themselves the office of trustees would be bound by the conditions of the trust in the same degree as trustees named by the testator, or by the Court. On the question of prescription of trust, see also *Univ. of Aberdeen v. Irvine*, 4 Macph. 392, as reversed in H. L., 26 March 1868.

CHAPTER LXVI.

Enforcement of trusts constituted by voluntary association of subscribers.

2102. There is a class of cases which falls naturally to be considered under this head ; those, namely, in which it has been settled that where a number of persons form an association, and subscribe funds for carrying out a particular purpose, any one of the subscribers has a sufficient *jus quæsitum* to entitle him to prevent a dissolution of the association, and to compel the trustees to proceed in the execution of the original purpose so long as that is practicable. On the other hand, where the scheme is eventually frustrated by the failure of the project, either totally or in any particular which can be considered as essential, the minority, or even an individual member, may insist on the dissolution of the association, and the division of its funds. Both these points were very clearly established in the well-known case as to the Glasgow Chapels ;⁽ⁿ⁾ and they are brought out with more or less clearness in various subsequent cases.^(o) In the case of *Bain*, Lord Cottenham, Ch.,^(p) expressed a doubt whether, if the Court should be of opinion that the purposes of an association had failed, and that it must be dissolved, there were any means short of an Act of Parliament by which the funds could be distributed among the subscribers. Lord Campbell^(q) suggested the raising of a multiplepointing, but hesitated to say that even that useful form of action would be adequate for the purpose.

English doctrine as to enforcement of charitable purposes.

2103. The law of England in regard to the duties of charitable trustees is the same as that which we have just noticed. "It is of course imposed upon the trustees," writes Mr Lewin,^(r) "whether individuals or a corporation, not to convert the charity fund to other uses than according to the intent of the founder or donor, so long as those uses are capable of execution."

SECTION II.

POWERS OF THE TRUSTEES.

Discretionary power will suffice to effectuate an indefinite charitable bequest.

2104. We shall now consider shortly the *powers* of the trustees of Charitable Trusts, in so far as these are exceptional or peculiar. It is no objection to a trust-deed that the powers conferred by it upon the trustees are of the most unlimited character. We have else-

⁽ⁿ⁾ *Bain v. Black*, decided 17 Nov. 1846, reported 12 July 1849, 11 D. 1286 ; affirmed 22 Feb. 1849, 6 Bell, 817.

^(o) *Presbytery of Fordyce v. Shanks*, 14 July 1849, 11 D. 1861 ; *Connell and Others v. Ferguson*, 6 March 1861, 28 D. 683. See also *McCasill v. Cameron*, 6 Feb. 1840,

2 D. 537 ; and *Steedman v. Malcolm and Others*, 24 June 1842, 4 D. 1441.

^(p) *Bain v. Black*, 22 Feb. 1849, 6 Bell, 817 ; see 829.

^(q) 6 Bell, 835.

^(r) Lewin on Trusts, 5th ed. p. 398 ; and see cases cited by him, pp. 398 *et seq.*

where pointed out that the object of the trust must be rational and workable,(s) and must be declared, if not in express terms, at least in such a manner that the purpose may be deduced inferentially;(t) for the enforcement of a trust which is wholly uncertain as to the object is of course impossible. A trust for objects of a general and comprehensive character, such as the promotion of a particular science,(u) or religious persuasion,(x) or the relief of deserving objects of charity in a given locality,(y) may be effectually carried out by giving large discretionary powers to the trustees, which are not regarded as arbitrary powers, but as discretionary trusts, the execution of which may be regulated and controlled by the Court of Session.

2105. These principles are clearly established by the cases of *Hill v. Burns*,(z) and *Crichton v. Grierson*,(a) elsewhere noticed. In the last of these cases, the Lord Chancellor(b) said, "A party may, in the disposition of his property, select particular classes of individuals and objects, and then give to some particular individual a power, after his death, of appropriating the property, or applying any part of his property, to any particular individuals among that class whom that person may select and describe in his will." Again, the late Dr Bell left certain sums to the Magistrates and Council of St Andrews, "the interest and produce thereof to be by them applied towards the moral and religious improvement of that city, and such other useful permanent works connected therewith as the said last-mentioned Provost, Magistrates, and Town Council shall from time to time, under the superintendence and with the approbation of the Lord-Lieutenant for the time being of the County of Fife, and the said trustees, or the survivors of them (certified by writing under their hands), direct." The Court held that the moral and religious improvement of the city constituted the primary purpose of the bequest, and that the Magistrates and Council were entitled, "at their own hands," to vote sums for such moral and religious purposes. They were further of opinion that the "other useful permanent works" need not be connected with the moral and religious improvement of the city, but that appropriations for them must be made with the separate consents of the Lord-Lieu-

Construction of powers of selecting objects from a class.

"Moral and religious improvement" of specified locality.

(s) Chapter 16, section 2; and chapter 18. The latest case of an inextricable trust is *Mason v. Skinner*, 6 March 1844, 16 Jur. 422.

(t) Chapter 24 (Charitable Bequests).

(u) *Mags. of Edinr. v. University of Edinr.*, 20 June 1851, 13 D. 1187.

(x) Boyle on Charities, 41-44.

(y) See the cases on charities noted *infra*.

(z) *Hill v. Burns*, 8 Sh. 889, N. E. 275; 14 April 1826, 2 W. & S. 80; *supra*, chapter 24. See *Milne's Trs. v. Cowie*, 1 Feb. 1853, 15 D. 321.

(a) *Crichton v. Grierson*, 4 Sh. 553, N. E. 561; 25 July 1828, 3 W. & S. 329.

(b) Lord Lyndhurst, 3 W. & S. 338.

SECTION 172. TRUSTS AND A TRUSTEE OF THE TRUSTS CERTIFIED BY WRITINGS UNDER THE SEAL.

SECTION 173. TRUSTS AND A TRUSTEE OF THE TRUSTS CERTIFIED BY WRITINGS UNDER THE SEAL.

2106. The law of England would seem to be as liberal as our own in regarding trusts, notwithstanding the unlimited discretion which they may confer on the trustees. Thus, Mr Boyle says, (d) "It is to be remarked, with reference to this class of gifts, and indeed to all trusts of a charitable nature, that there is no need of any particular words or things being specified, the utmost latitude and liberality being allowed in this respect. To a certain extent, indeed, it seems essential that dispositions of this kind should be made in the most general terms, being frequently their very generality which constitutes their charitable character."

SECTION 174. TRUSTS AND A TRUSTEE OF THE TRUSTS CERTIFIED BY WRITINGS UNDER THE SEAL.

2107. And such as we have had occasion to remark, trustees are bound to follow the expressed or implied directions of the truster, but they have the power to make such alterations in the mode of administering the trust as will not amount to a substantial particular. Thus, where a mortification was made for supporting and setting at work by employing them in a certain manufactory, it was held to be no inversion or misapplication of the trust to employ them in a linen manufactory. (e) A bequest was made to the Farmers' Society of East Salton, which had been incorporated in 1841, the interest only to "be employed in the improvement of the management of agriculture, or any other purpose connected with it." After the testator's death the Society was divided by a minority joined the Haddington Society, the majority being joined by the East Lothian Agricultural Society; and out of the trustees jointly it was agreed that two should be joint trustees. Pringle and the rest of the minority, who refused to assent, claimed the bequest, but the Court gave it to the East Lothian Agricultural Society, which they held to be merely an extension of the Salton Society; coming to that opinion the more easily, that the latter Society had not confined its exertions to a local district. (f)

SECTION 175. TRUSTS AND A TRUSTEE OF THE TRUSTS CERTIFIED BY WRITINGS UNDER THE SEAL.

2108. The existence of the power which we are now considering, and the limits which the Court put upon it, are well brought out by a comparison of the cases of *Forbes v. The Magistrates of Glas-*

(c) *Town Council of St Andrew v. Dr Bell's Trustees*, 17 July 1845, 17 Scot. Jurist, 583.

(d) Boyle on Charities, 24, and cases there cited.

(e) *Town of Edinburgh v. Binny*, 22

Nov. 1698, M. 9107. But see *Bonar v. Christian Knowledge Soc.*, 10 March 1846, 8 D. 666.

(f) *Pringle v. The M. of Tweeddale*, 16 Dec. 1823, 2 Sh. 588, N. E. 505; see

Craigie v. Marshall, 12 D. 522.

gow,(g) and *Davidson v. Macgregor*,(h) in which acts in pursuance of the powers were sustained, with the cases of *Ramsay v. The College of St Andrews*,(i) and *Ramsay v. Brewster*,(k) in which the proceedings were held to be in excess of the powers. Where the deed of mortification was silent as to the period for which a bursary was to be held, it was decided that the original statutes or universal usage of the College might be looked to as settling it; but if there was no statute and no universal usage on the point, then that it fell to the patron to determine it.(l) Again, where the number of bursaries under a mortification was not fixed, it was held to be within the power of the trustees to diminish their number without consulting the Magistrates of the burgh, who had immemorially presented to them.(m)

2109. The powers of trustees generally to *make investments* have been already fully considered,(n) and it is unnecessary to treat of them as affecting the particular class of trustees with which we are at present dealing. It may be sufficient here to refer to two cases. The first was a case (o) in which the trustees of a mortification, having obtained an Act of Parliament authorising them to sell lands and houses of which they had the *dominium utile*, and buy other lands, were held not entitled to buy feu-duties; Lord Mackenzie(p) putting it a good deal on this, that feu-duties may fall off, but cannot increase in value like land. The other was a case(q) in which a testatrix had directed her trustees to place a sum in the public funds sufficient to pay certain fixed annuities, amounting together to £50 a year. Although it was obvious that if the government rate of interest were reduced, the purchase might not always produce the £50, Lord Gillies said,(r) with the approbation of the Court, "As the law regards such an annuity at present as a perpetual annuity, I think that the purchase of it would sufficiently implement the will of the testator. And, in any view, the mere possible contingency of this annuity at some future period falling below £50, is one which must have affected many cases similar to this, and does not seem to require to be provided for by the Court."

Powers of trustees for charities as to investment of the trust-funds.

(g) *Forbes v. Mags. of Glasgow*, 21 Feb. 1837, 15 Sh. 628, and 13 June 1839, M'L. & Rob. 580.

(h) *Davidson v. Macgregor*, 27 Feb. 1850, 12 D. 789.

(i) *Ramsay v. United College of St Andrews*, 7 June 1242, 4 D. 1866.

(k) *Ramsay v. Brewster and Others*, 20 July 1859, 21 D. 1867.

(l) *Playfair v. United College of St Andrews*, 18 July 1850, 12 D. 1284.

(m) *Mags. of Lanark v. Trs. of Batties-*

main's Mortification, 17 June 1852, 14 D. 876.

(n) Chapter 68, sect. 4. As to the completion of titles to heritable estate in the persons of trustees for chapels and schools, see chapter 57, § 1822.

(o) *Govs. of Cauvin's Hospital*, 29 Jan. 1842, 4 D. 556.

(p) 4 D. 557-8.

(q) *Ballantine v. Mags. of Ayr*, 17 Jan. 1838, 16 Sh. 325.

(r) 16 Sh. 330.

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Powers of
granting leases
of the trust-
lands.

2110. The right of the trustees under a mortification to *grant leases* of the mortified lands was first settled in the case of the *Town of Edinburgh v. Binny*,^(s) already mentioned. It has never since been doubted. In England there would seem to have been a great many cases in regard to the particular manner in which the trustees may exercise this power; as, for instance, that governors of charities cannot grant leases to one of themselves;^(t) that they should be cautious how they grant leases to their own relations;^(u) that they may take *finés* (*grassums*, as we should call them) or *rents*, as may be most beneficial to the charity;^(x) that the leases must be for an adequate consideration, else they may be cancelled;^(y) that if the lease is of an unreasonable endurance, it may be set aside on that ground.^(z) It is not necessary, however, to go into these questions here; but reference may be made to Mr Lewin's work, where they are all fully discussed.^(a)

Powers of sale.

2111. We have next to consider the power of the trustees to *sell* the trust-subjects. Whether particular trustees have or have not this power, will always mainly depend on the language of the trust-deed under which they act. It will also depend to some extent on the circumstances of the trust at the period when the question arises. In one case^(b) it was decided that the trustees of a charitable institution, who held lands of the Crown, were entitled to sell the superiority for the benefit of the trust. This was permitted partly, no doubt, because the price offered was a very large one; for in another case^(c) it was held that trustees could not alienate such superiority gratuitously, or without adequate value. But the Court were probably also influenced by the consideration, that a superiority was at that time comparatively valueless, whilst it remained united to the *dominium utile* in the person of the trustees; and that it was only when separated and offered for sale that it acquired value at all. At all events, the Court have now laid it down as a settled principle, following the decision of the House of Lords in *Allan v. Glasgow's Trs.*,^(d) that where the trust-deed does not confer on charitable trustees power to sell the trust-subjects, they will not supply that power unless its exercise would be not

^(s) *Town of Edin. v. Binny*, 22 Nov. 1698, M. 9109.

^(t) *Attorney-Gen. v. Dikie*, 18 Ves. 519; *Attorney-Gen. v. Earl of Clarendon*, 17 Ves. 491.

^(u) *Ferraby v. Hobson*, 2 Phill. 261; *ex parte Skinner*, 2 Mer. 457.

^(x) *Attorney-Gen. v. Mayor of Stamford*, 2 Swans. 592.

^(y) *Attorney-Gen. v. Morgan*, 2 Rus. 306.

^(z) *Attorney-Gen. v. Brooke*, 18 Ves. 326.

^(a) Lewin on Trusts, 5th ed. p. 408 *et seq.*

^(b) *Moore's Trs. v. Wilson* 25 June 1814, F.C.

^(c) *Christie v. Mags. of Stirling*, 6 July 1774, M. 5755.

^(d) *Allan v. Glasgow's Trs.*, 7 March 1832, 10 Sh. 488, 2 S. & M'L. 388.

only *beneficial*, but absolutely *necessary* for the due administration of the trust.^(e) CHAPTER LXVI.

2112. The same principle was recognised in two other cases,^(f) in regard to the sale of church sites and buildings; but in both of them, it is proper to explain, that the trustees were held bound to invest the price they obtained in the purchase of new sites and erection of new churches, which thus came to be a sort of *surrogata* for the old. In the case of the *Magistrates of Airdrie v. Airdrie Chapel Committee*,^(g) it was decided that persons who held the double position of being members of a chapel committee and also trustees of a school, erected partly from public subscriptions and partly from the funds of the chapel committee, had no right to sell, for payment of chapel debts, the school buildings, the title to which had been taken by the committee to themselves and their successors, for the "use of a public school or seminary in all time coming." In England the sale of charity property is now entirely regulated by statute,^(h) the Commissioners of Charities being empowered to authorise sales, and the trustees being prohibited from selling without their sanction.

2113. The power of the trustees to *borrow*, rests, to a large extent, on the same grounds with those just stated as to their power to sell. Accordingly, where the power is not expressly given by the trust-deed, they will not be allowed to exercise it merely because it would be beneficial, but only if it is necessary for the administration of the trust.⁽ⁱ⁾ The cases, however, would seem to show, that where the income from the trust-fund is at a particular date inadequate for the proper execution of the trust purposes, the trustees may, in the course of fair management, lay some burdens upon the fund itself, in the anticipation that the income will increase. Thus, in the case last referred to,^(k) Lord Medwyn said, "I have no conception that if the trustees, on their own responsibility, borrow money, or lay out a large sum on repairs in any year, they will be bound to make the whole a deduction from the receipts of that year, so far diminishing the payments to the objects of the charity, or that they may not pay off such sums by instalments in subsequent years." The principle is, that the charity being perpetual, the *commodum* and *incommodum* should be distributed, and

Construction of special powers of sale.

Power to borrow on security of the estate, whether implied in charitable trusts.

(e) *M'Leish's Trs. v. M'Leish*, 25 May 1841, 8 D. 914.

(f) *Johnston v. Mags. of Canongate*, 30 May 1804, M. 15,112; *Presbytery of Aberdeen v. Cooper and Others*, 20 March 1860, 22 D. 1053.

(g) *Mags. of Airdrie v. Airdrie Chapel Committee*, 18 July 1850, 12 D. 1222.

(h) 16 & 17 Vict., c. 137; 18 & 19 Vict., c. 124; 23 & 24 Vict., c. 136.

(i) *M'Leish's Trs. v. M'Leish*, 25 May 1841, 8 D. 914.

(k) 8 D. 922.

CHAPTER LXVI. neither should fall wholly to the lot of one set of beneficiaries. Again, Sir Thomas Burnett having in 1648 mortified certain lands, the rents of which were to be applied in educating and entertaining three bursars in King's College, Aberdeen, and a question having arisen, long afterwards,^(l) as to the application of the rents, which had greatly increased, Lord Mackenzie observed,^(m)—"I do not say, if the College, as managers, had put in their minutes that—whereas we find that the rents at present are not adequate to afford any reasonable allowance to these bursars; but whereas we see that feuing has commenced in that neighbourhood, and that the rents are likely to raise a large sum annually; therefore, we advance or borrow a sum of money towards the maintenance of the existing bursars, reserving to ourselves to pay it off when the rents shall have risen,—I do not know whether, if that had been done, they would not have been entitled to restitution out of the increased produce. I would not say that there might not be an equalisation fund, because the rents may not be paid in a particular year."

*Arbroath Bank
v. Stevenson.*

2114. In another case,⁽ⁿ⁾ lands were bought with funds mortified for behoof of the poor of Arbroath in all time coming. The trust-deed contained no power either to sell or to borrow; but in a time of distress the trustees, *qua* such, borrowed £500. The annual proceeds of the mortified lands were £200. The Court held that the creditors could not adjudge the lands, but were entitled to be paid out of the rents. Lord Jeffrey said, "At the same time, I may add, that I would feel great doubts, if this debt were due to Shylock or any hard usurer, that the trustees of the mortification would escape from personal responsibility. The bank, however, will no doubt give time, and allow these parties to settle according as they get their funds." It is proper to mention that in a recent case,^(o) in regard to an ordinary private trust, the whole Court held, that where the trust-deed does not by construction or implication empower the trustees to borrow money on the security of the trust-estate, it is not competent for the Court, in the exercise of its *nobile officium*, to confer such power on the trustees. In that case it was alleged, that if the power were not granted, the trust-estate would be adjudged for debt (calls upon shares of the Western Bank, of which it partly consisted). In England the power of borrowing on the security of trust-estate is regulated by the same statutes which regulate the power of sale.^(p)

^(l) *Burnett v. King's College, Aberdeen*, 28 Feb. 1844, 6 D. 781; reversed 28 Aug. 1846, 5 Bell, 409.

^(m) 6 D. 746.

⁽ⁿ⁾ *Arbroath Banking Co. v. Stevenson and Ors.*, 16 June 1847, 9 D. 1228.

^(o) *Kinloch and Ors.*, *petrs.*, 7 Dec. 1859, 22 D. 174.

^(p) *Supra*, § 2112.

2115. The power of charitable trustees to *feu out* the mortified lands has been long recognised, (q) and it may be exercised without the authority of the Court. (r) Where, however, lands were conveyed to trustees under the express condition that they were "never to be sold, but to remain as mortified land for ever," it was held (s) that the trustees could not *feu* them out. It is doubtful whether this judgment would be repeated; at the same time, Professor More, who notices it, does not suggest that it should be reconsidered. (t)

Power to *feu* may be exercised without the interposition of the Court.

2116. The power of the trustees of educational foundations to dismiss, on sufficient grounds and after a fair trial, teachers appointed by them *ad vitam aut culpam*, has been recognised in various cases. (u) In the last of these the law on the point is very fully stated by Lord Justice-Clerk Hope thus: (x)—"A very mistaken notion seems to be entertained of the effect of such a teacher receiving his appointment *ad vitam aut culpam*. It seems to be thought that the effect of such an appointment is to alter the *relation* which subsists between him and those who appoint him and manage the institution; so that his *conduct* is not to be *judged of by them*, or the *culpa* to be established by their judgment and decision. This is a serious error. They are still his *employers*, and have the general rights and duties of that relation as much as before, with the single exception, that they cannot dismiss him except when serious misconduct or inefficiency shall be established. But the right to inquire, judge, and dismiss him, still remains with them. It is their opinion by which the *culpa* is to be judged of, as the late Lord President said; and the Court will interfere only where there is irregularity, precipitation, and oppression in the course of the proceedings, and manifest failure to make out any serious case on the merits. And, above all, the power to inquire into all matters or rumours affecting the teacher's character and usefulness remains with them, unaffected by the tenure of his situation." That being so, a teacher holding such an appointment is bound to attend the trustees or directors from whom he holds his office, when they summon him, and to afford them all reasonable explanations as to his conduct when impugned. If he refuses to attend or give explanations, he may be dismissed at once. (y) In

Administration of trusts for educational purposes.

(q) *Merchant Company v. Heriot's Hospital*, 9 Aug. 1765, M. 5750.

(r) *Craigcrook Mortification v. Sawers*, 19 June 1794, Bell's Fol. Ca. 49.

(s) *Ibid.*

(t) More's Notes on Stair, p. 168.

(u) *A. B. v. Ayr Academy*, 8 June 1825, 4 Sh. 68, N. E. 65; *Murray v. Directors of Dundee Academy*, 2 July 1838, 11 Sh. 856; *A. B. v. C. D.*, 29 June 1844, 6 D. 1238.

(x) 6 D. 1243.

(y) *Per* Lord Justice-Clerk Hope, 6 D. 1243.

CHAPTER LXVI. that case the trustees are not bound to investigate the matters of complaint further: "the inquiry before them is not for conviction; it is to enable them to decide whether they should retain or dismiss." (z) We shall have to consider hereafter the Court's power to review the trustees' decisions.

Trustees may act by a majority or quorum.

2117. As in all other cases, unless there is anything in the trust-deed to prevent it, a majority of the trustees are always entitled to do all acts connected with the trust management. (a) Where a quorum is provided for, the provision must be attended to. In an old case, (b) however, it was held that although the quorum of administrators of a mortification was fixed at two, yet where there was only one survivor he was entitled to act; and that when he died, the patrons, or their heirs and assignees, failing them the King, as *ultimus hæres*, might name new administrators. "Yet," observes the reporter, Fountainhall, (c) "our Acts of Parliament name the bishops of the diocese and the Chancellor of the kingdom to have the oversight and management of hospitals in case the foundation be not kept." In a later case, (d) where the right of examining and presenting candidates for a bursary was given to the holders of three public offices, one of these being vacant, it was held that the holders of the other two might act and present.

SECTION III.

LIABILITIES OF THE TRUSTEES, AND REMEDIAL JURISDICTION OF THE COURT.

Proceedings *ultra vires* of the trust bind the trustee, but not the estate.

Expenses of litigation;

2118. The acts of the trustees may be such as to bind the trust, or they may only bind themselves. Generally, all acts done and obligations undertaken by them within the powers conferred by the trust-deed, will bind the trust-estate. On the other hand, acts done by them *ultra vires* will not bind the trust, but may bind themselves. Thus, the minister of a parish, who was *ex officio* one of the trustees under a mortification, raised an action of declarator against his co-trustees for the purpose of obtaining the directions of the Court in regard to the administration of the trust. Having, in consequence of deposition, ceased to be a trustee before the case was ripe for decision, and having died soon after, the action fell asleep, and judgment never was pronounced. The Court were of

(z) *Ib.*

(a) See 24 & 25 Vict., c. 84, § 1.

(b) *Hospital of Largo v. Earl of Wemyss*, 15 July 1680, M. 14,722.

(c) M. 14,722.

(d) *Campbell v. M'Intyre*, 12 June 1824, 3 Sh. 126, N. E. 85.

opinion that the litigation was beneficial to the trust; and accordingly, held that the minister's assignees were entitled to claim out of the trust-funds the expenses incurred by him as between agent and client.^(e) The Court expressly found that memorials to counsel were to be included in the expenses allowed; both the Lord Justice-Clerk and Lord Murray laying it down that "trustees are clearly entitled to the expense of consulting counsel."^(f) The Justice-Clerk added,^(g) "The trustees will hereafter carry on the management of the trust at their own hazard, and will have little favour shown them, should the correctness of their distribution of the funds be disputed, when an action has been brought to such a point as they may easily, by sisting themselves, carry it to a conclusion, and so procure the direction of this Court for their guidance and safety." Lord Jeffrey's opinion in the case of *The Arbroath Banking Co. v. Stevenson and Others*,^(h) quoted above, shows the risks trustees run when their acts are *ultra vires*.

2119. When the trust purposes have been violated, and wrong thereby done, no remedy exists against the trust-estate. That would appear not to have been the law of Scotland at one time, but it was very authoritatively settled as the law thenceforth in the case of *Ross v. Heriot's Hospital*,⁽ⁱ⁾ following upon the case of *Duncan v. Findlater*,^(k) in regard to road trustees. The action, which was for damages, was rested on the allegation that, through the erroneous acts of the trustees or governors of the Hospital, the pursuer had lost the benefit of the charity, to which he was entitled under a sound construction of the truster's deed. The House of Lords, reversing the judgment of the Court of Session,^(l) refused to listen to the statement of the wrong, on the ground that the pursuer had asked redress out of the trust-funds, which they held not to be liable to any such demand. Lord Brougham observed, in delivering judgment,^(m) "The charge against them (the governors of the hospital), upon which this extraordinary claim for compensation out of the fund of the hospital is made, is this, that the governors of the said hospital have illegally and improperly, and in the face of the will and the statutes before referred to, done the act in question; so that it is neither more nor less than this modest

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of consulting
counsel.

The estate is
not responsible
for the tortious
acts of the
trustees.

(e) *Shepherd and Grant*, compearers in *Gillies v. Hutton's Trs.*, 24 Feb. 1855, 17 D. 516. See Lord Cottenham's speech in *Ross v. Heriot's Hospital*, 5 Bell, 49.

(f) 17 D. 523.

(g) *Ib.*

(h) *Arbroath Banking Co. v. Stevenson and Others*, 9 D. 1233.

(i) *Ross v. Heriot's Hospital*, 19 March 1846, 5 Bell, 37.

(k) *Duncan v. Findlater*, 23 Aug. 1839, M'L. & Rob. 911.

(l) *Ross v. Heriot's Hospital*, 14 Feb. 1843, 5 D. 589.

(m) 5 Bell, 53.

CHAPTER LXVI. charge, that because the trustees have illegally and improperly violated their trust, that is to say, violated the statutes under which they hold their office as trustees, therefore what?—Not that they themselves, the wrongdoers, should pay for having violated the trust, and in the face of the will and statutes done the tortious acts, and committed the injury out of which damage arose to the party complaining: no such thing; but that the fund should be answerable, and that out of that trust-fund this compensation should be given for the wrong committed upon Ross by the malfeasance of the trustees. I do not think it is possible to conceive a much more absurd and untenable proposition.”

Costs of promoting or opposing bills in Parliament.

2120. Where a private bill for regulating the disposal of trust-funds had been successfully resisted, the Court held that the expense of the opposition could not be made good against the trust, even assuming the bill to have been a job, and the opposition most proper.(n) It may be doubted, whether in this case the Court did not carry the principle established in the case of *Heriot's Hospital*, too far. At the time when the claim for the expenses was made, the opponents of the bill had come to be the trustees themselves. They had preserved the funds according to the will of the truster; they had, in fact, acted as trustees in opposing the bill; and it may well be questioned whether they were not entitled to reimbursement out of the trust-estate.

Personal liability of trustees of charities for breach of duty.

2121. We are not aware of any action which has yet been directed against charitable trustees personally for injuries arising from their breach of duty; but after the decision in the case of *Ross*, and that in regard to statutory trustees in the case of the *Ministers of Edinburgh v. The Magistrates of Edinburgh*,(o) there can be little doubt that such an action would be sustained if sufficient allegations of breach of trust, and injury thence resulting, were set out on record. Were such an action raised, it would no doubt be made a question how far charitable trustees are entitled to the protection of the recent statute.(p) We refrain from offering any opinion on this point beyond what we have already indicated.(q)

(n) *Trustees of the Mackintosh Fund v. Mackintosh*, 30 June 1852, 14 D. 928. Compare with this, *Milne v. Fraser and Ors.*, 25 Nov. 1859, 22 D. 88; and *Pet. Campbell*, 12 Jan. 1847, 9 D. 897, where expenses were allowed.

(o) *Mins. of Edin. v. Mags. of Edin.*, 28 May 1845, 7 D. 663; affirmed 28 Aug. 1846, 6 Bell, 509.

(p) 24 & 25 Vict., cap. 84, § 1.

(q) The law of England on these points appears to be exactly the same as the law laid down by the House of Lords in the cases which have just been considered; indeed, it was with a scarcely disguised purpose of assimilation that these judgments were pronounced.

2122. Whether from its inherent rights as the supreme civil tribunal in the land, from its representing the Crown, or because it comes to some extent in the place of the Chancellor of Scotland, the Court of Session unquestionably possesses the right of controlling all charitable trustees in Scotland, and of determining all actions brought against them. "There can be no question," said Lord Cuninghame in the case of *Ross v. Heriot's Hospital*,^(r) "as to the general doctrine, that this Court, as the Supreme Court of Equity in Scotland, has jurisdiction over all charities, in so far as to declare the powers of the administration; to correct all abuses; and to enforce the will of the founder." In another case,^(s) Lord Fullerton observed,^(t) "Where a person locates his trust in a particular country, he must be presumed to have had the law of that country in view when he executed his trust." Accordingly, although the trust-deed was made in Jamaica, it was held that it fell to be interpreted according to Scots law. This is quite in accordance with the English law of jurisdiction, as exhibited in a variety of cases.^(u)

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Remedial jurisdiction of the Court of Session in relation to charities.

2123. But while the Court's power of control is undoubted, it will not be exercised until after the trustees have, in the first instance, decided upon the matters in dispute; and even after that, the Court will only review the decisions of the trustees where their proceedings have been very irregular, and their conduct amounts to abuse of their powers more or less gross.^(x) The Court has ever expressed an especially strong disinclination to interfere on light grounds with the administration of trustees who have been personally selected by the truster to carry out his charitable intentions.^(y) In the *Milne Bequest* case, the Lord Justice-Clerk Hope said, "Many debateable and doubtful or nice questions may arise, on a great number of private letters, as to the testator's wishes and opinions. On these the trustees are to decide; and I do not think that the testator intended the Court to entertain such questions as to his opinions and wishes, or to review the decisions which the trustees may come to; for to them, and not to the Court, is given the power of collecting his opinions from the letters, and the substitution of a court of law for that purpose, instead of the trustees,

Court will not readily interfere in the way of prevention of a threatened breach of trust.

^(r) *Ross v. Heriot's Hospital*, 5 D. 609.^(s) *Ferguson v. Marjoribanks*, 1 April 1858, 15 D. 637.^(t) 15 D. 648.^(u) *Per* Lord Hardwicke in *Magistrates of Edin. v. Aubery*, 1 Ambler, 286; *per* Lord Eldon in *Attorney-General v. Lepine*, 22June 1818, 2 Swanston, 181; *per* Lord Gifford in *Emery v. Hill*, 1 Russ. 112.^(x) *A. B. v. C. D.*, 29 June 1844, 6 D. 1238; *Graham v. Magistrates of Stirling*, 19 June 1847, 9 D. 1296; *Liddel v. Kirk-Session of Bathgate*, *ut supra*, 16 D. 1075.^(y) *Milne's Trs. v. Cowie*, 25 Jan. 1858, 15 D. 821.

CHAPTER LXVI. is a very perilous thing indeed.”(z) The proper form in which to raise any question as to the trustees’ mode of administration, is by action of declarator, and not by interdict.(a) Of course, to prevent their taking a step which would be irrevocable, the latter process may be resorted to in the first instance. When the Court are satisfied that the case is one in which they should interfere for the purpose of regulating the trust-management, the course which is usually adopted is to remit to some neutral person to prepare a *scheme*. When this is lodged, opportunity is given to the trustees and others interested to object to it; but when the objections have been disposed of, and the scheme finally settled and approved of, the trustees must strictly conform their actings to its provisions.(b)

Liability of the trustees for the expenses of administration suits.

2124. In regard to the expenses occasioned by calling for the Court’s interference in the administration of a trust, it will depend on the nature of the litigation whether they will be allowed out of the fund or not. If the questions raised are fairly disputable, the Court will allow the expenses of both parties out of the fund, even though the intention of one of them was to set aside the charitable bequest altogether.(c) But “unless there be a fair question in the cause,” said Lord Gifford,(d) the parties raising the action “shall do it at their own expense, and not diminish that fund which the party had destined for charitable purposes.” On the other hand, where certain members of an ancient charitable society, including the office-bearers thereof, were illegally endeavouring to dissolve it and divide the funds among themselves, they were found personally liable in the expenses of an action raised to prevent the dissolution.(e)

English trusts subject to the jurisdiction of the Court of Chancery.

2125. In England the power of controlling charitable trustees belongs to the Court of Chancery. “By the constitution of the laws of England,” says Mr Boyle,(f) “the King has an original right, *pro bono publico*, to superintend the care and management of charities; and that right is exercised by the King in his High Court of Chancery; forming, in fact, part of its original jurisdiction.”

(z) 15 D. 831.

(a) *Magistrates of Lanark v. Trustees of Battiesmain’s Mortification*, *ut supra*, 14 D. 876.

(b) *Shepherd & Grant v. Connell and Ors.*, 24 Feb. 1855, 17 D. 516; *Mags. of Dundee v. Morris*, 8 Feb. 1861, 23 D. 493; *Morison, Petr.*, 30 June 1863, 1 Macph. 1009. See *Liddle v. Kirk-Session of Bathgate*, 14 July 1854, 16 D. 1075, in which the Court

refused to allow a scheme to be lodged, and the reasons of the refusal, as stated by the Lord President, p. 1080, and Lord Rutherford, p. 1088.

(c) *Hill v. Burns*, 14 April 1826, 2 W. & S. 80.

(d) 2 W. & S. 92.

(e) *Steedman v. Malcolm*, 23 June 1842, 4 D. 1441.

(f) Boyle on Charities, 12.

Mr Lewin (*g*) distinguishes between the *visitatorial* power of the Crown and the Court's right to control the management of the charity revenue. The distinction rests chiefly on the corporate or public character of English charities, and cannot be said to have any place with us. CHAPTER LXVI.

2126. On the question of the title to sue for the enforcement of a charitable trust, the general doctrine cannot be better expressed than in the words of Lord Cuninghame, in the case of *Ross v. Heriot's Hospital*: (*h*)—"It appears equally indisputable that any party possessing an interest, either existing or contingent, in the right administration of the Hospital, has a good title to pursue all actions before this Court necessary for ascertaining and declaring the powers and duties of the Governors, and enforcing their execution." The pursuer in that case was a lad claiming admission into the Hospital as being (in terms of the will of the founder) "a poor fatherless boy, the son of a freeman and burgess of the town of Edinburgh." In an earlier case (*i*) an action was sustained against the Governors of the same Hospital, at the instance of the Merchant Company and Incorporated Trades of Edinburgh. In the case of *Hill v. Burns* (*k*) the right of the relations of the truster, *vi sanguinis*, to sue the trustees, was fully recognised. Title to sue individuals of the class beneficially interested.
Public corporations.
Heirs of the truster.

2127. In *Bow and Others v. The Patrons of Cowan's Hospital*, (*l*) a committee appointed by the Guildry Incorporation of Stirling were found entitled to raise an action calling to account the trustees of a mortification for behoof of "twelve decayed guild brethren" of that town. In this case the Court repelled an objection to the title of the pursuers, on the ground that, supposing the corporation to have a title, it could only sue under its proper *nomen juris* of the Dean and Corporation, and could not transfer its right to a committee; Lord Glenlee observing, (*m*) "A corporation as well as an individual may appoint a commissioner to sue for their behoof, and all that is requisite is sufficient evidence of the commissioner's authority." The Magistrates of Edinburgh, as patrons of the University, were held entitled to raise an action for the purpose of having the proper effect given to a trust for the endowment of a Chair of Music within the University; (*n*) and the able-bodied poor. Representatives of the charity.
Patrons of educational institutions.
The poor.

(*g*) Lewin on Trusts, 5th ed. p. 396.

(*h*) *Ross v. Heriot's Hospital*, 5 D. 609.

(*i*) *Merchant Co. and Incorp. Trades of Edin. v. Heriot's Hospital*, M. 5750. In the *Morgan* case the claimants were the Magistrates and Town Council of the burgh in which the bequest was to be executed.

(*k*) *Hill v. Burns*, 3 Sh. 389, N. E. 275; and 2 W. & S. 80.

(*l*) *Bow and Ors. v. Patrons of Cowan's Hosp.*, 6 Dec. 1825, 4 Sh. 276, N. E. 280.

(*m*) 4 Sh. 277, N. E. 281.

(*n*) *Mags. of Edin. v. Professors of the University*, 20 June 1851, 18 D. 1187.

CHAPTER LXVI. of the parish of Bathgate were held *in titulo* to vindicate by action their right to share in the benefits of a bequest to "the poor in the said parish." (o) It is unnecessary to cite other illustrations on this point.

SECTION IV.

ASSUMPTION AND APPOINTMENT OF NEW TRUSTEES.

Whether *ex officio* trustees are entitled to decline a trust.

2128. A testator desirous of providing for the perpetuation of the trust-management may either name individual trustees, giving them power to assume others ; or he may confide the execution of his trust to certain official persons, whether a corporation or not, and their successors in office. In the latter case, as we have seen, the successors in office of the officials first named succeed them in the trust. (p) As to whether an *ex officio* trustee can decline to act, it may, on the one hand, be said that no one is entitled to accept an office without undertaking all its burdens ; on the other hand, it would be hard to say that a man must refuse a seat on the Bench, or a chair in an University, because it may happen that the occupants of these positions are *ex officio* the managers of a petty but troublesome trust. There is scarcely any authority on the point ; but in one case (q) Lord Justice-Clerk Hope expressed an opinion, that the minister of a parish who was *ex officio* a trustee of a mortification for educational purposes was not bound to act. Trustees may safely be advised to act upon this opinion.

Continuation of trust by means of powers of assumption.

2129. Where a truster gives his trustees power to assume new trustees, so long as the trustees exercise the power there can be no difficulty in carrying on the trust, and the Court will not interfere ; though in one case (r) they did interfere so far as to confirm the assumed trustees. Where the trust-deed gives power to assume trustees "to act *with*" the original trustees, the trust will not lapse on the death of the last surviving original trustee, but will be kept up in full force in the person of the assumed trustees. (s) In another case (t) Lord Brougham said,—“ Though the trustees are only empowered to assume on vacancies, that is quite sufficient for con-

(o) *Liddle v. Kirk-Session of Bathgate*, 14 July 1854, 16 D. 1075. See also *Newton v. Couper*, 2 March 1865, 3 Macph. 573.

(p) *Macara v. College of Aberdeen*, 1 Feb. 1786, Hailes, 975, M. 15,948.

(q) *Shepherd and Grant v. Connell and Ors.*, 24 Feb. 1855, 17 D. 520.

(r) *Pet. Morison*, 18 Jan. 1884, 12 Sh. 307 ; and 11 March 1884, 12 Sh. 547.

(s) *M'Leish's Trs. v. Gibson and Ors.*, 25 May 1841, 3 D. 914.

(t) *Black's Trs. v. Miller and Ors.*, *ut supra*, 2 S. & M'L. 890. Trustees of charitable institutions may now (by 24 and 25 Vict., c. 84, § 1) assume new trustees, though no power of assumption is given by the trust-deed, and though the original trustees have been reduced to a single survivor.

tinuing the trust, and would make it their duty to continue it, even if they altogether declined themselves.” CHAPTER LXVI.

2130. The cases of difficulty, however, are where the truster has himself named no trustees ; or where he has given no power of assumption ; or where the trustees have all failed through death, declinature, or any other cause. The question then arises as to the Court's power to nominate trustees. The decisions have not been quite uniform, but the following principles, may, we think, be deduced from them with tolerable certainty :—(1) Where the testator has sufficiently constituted the trust, but failed to name trustees at all, the Court will appoint *original* trustees (called managers), and adjust a scheme of administration. (u) (2) Where the acceptance of the trustees is, in the mind and by the language of the testator, a necessary condition of the trust taking effect, if they fail the Court will not supply their place. As Lord Brougham said in the case of *Black's Trustees v. Miller*, (x) “ If a trustee dies or refuses the trust, where it is quite clear that the intention of the testator was that, in that event, the heir shall take the estate discharged of any trust, the Court would not be fulfilling the intention of the maker of the deed, but acting contrary to his intention, if it supplied a trustee in that case ; that is the very event provided for in which it was to go over, and the trust to cease.” (3) Again, where there are only factorial duties to be discharged, the Court will not name *new* trustees, but will appoint a judicial factor. (y) (4) Where, however, a necessity exists for it, as in the case where the duties to be discharged are of a discretionary character, the Court has the power, which it will exercise, of appointing *new* trustees. (z) The doctrine is so laid down by Mr Erskine, (a) and the Court have acted upon it when a necessity has arisen for its interference. We shall illustrate these principles by referring to one or two cases in which the

Appointment of trustees and managers by the Court.

Principle stated.

(u) *Mags. of Dundee v. Morris and Ors.*, 23 D. 493 ; *Morrison and Ors.*, Petrs., 80 June 1863, 1 Macph. 1009.

(x) 2 S. & M'L. 890. See *M'Dowal v. M'Dowal*, 1789, M. 7453.

(y) *Falconer*, Petr. 4 Dec. 1830, 9 Sh. 142. See *Grant*, Petr., 13 Feb. 1790, M. 7454 ; *Moir*, Petr., 6 July 1826, 4 Sh. 801, N. E. 808 ; *M'Aslan*, Petr., 17 July 1841, 3 D. 1263.

(z) *Campbell v. Campbell*, 26 June 1752, M. 7440 ; *M'Dowal v. M'Dowal*, *supra* ; *Moir*, *supra* ; *Preston's Trs. v. Lady Baird Preston*, 8 Feb. 1838, 16 Sh. 457 ; *Trs., etc., of the Prime Gilt Box of Kirkcaldy*, 27 May 1859, 21 D. 871 (see 4 D. 1441) ;

Morison and Ors., *supra*. But see *contra*, *Dick v. Ferguson*, 22 Jan. 1758, M. 7446 ; *Marjoribanks*, 27 Feb. 1822, 1 Sh. 855 ; *Ferguson v. Marjoribanks*, 1 April 1853, 15 D. 637 ; *Lindsay*, 9 D. 1297, and 19 Scot. Jur. 433.

(a) Ersk. 3, 9, § 14. The law of England on this matter is, in so far as general principles are concerned, very similar to our own. But the details are so much affected by the peculiarities of the practice of the Court of Chancery, that it would serve no good purpose to refer to them more particularly in this place. The subject is very fully treated by Mr Boyle in his work on Charities, p. 212 *et seq.*

CHAPTER LXVI. Court has nominated original and new trustees for the administration of charitable and corporate institutions.

Examples of the appointment of original trustees by the Court of Session.

Kirkcaldy case.

2131. The first case of which we have obtained an authentic account is that of the *Prime Gilt Box of Kirkcaldy*, a quasi-corporate institution of the nature of a guildry, the management of which had fallen into abeyance. The defenders having been ordained(b) to convey the property "*in trust to such person or persons as the Court may name*, and in such terms and under such conditions as the Court may hereafter direct," the process was remitted to the Lord Ordinary "to hear parties further, and make the necessary inquiries, with a view to the adjustment of the rights of parties, in consistency with the nature and purposes of the institution and its altered circumstances." Under this remit, the Lord Ordinary made a remit to Mr Andrew Jameson, Advocate (19 July 1842), "to inquire, examine, and report to the Lord Ordinary as to the proper course to be adopted in carrying into effect the findings of the Court, in consistency with the nature and purposes of the institution, and its altered circumstances, and with power to the reporter to take such assistance as he may find necessary." The Court had in the meantime appointed a judicial factor for the temporary management of the affairs of the institution. After full inquiry and investigation, Mr Jameson reported to the Lord Ordinary a proposed new constitution and rules for the management of the Prime Gilt Box Society. This constitution suggested, section 1, that "the whole funds, property, and effects, heritable and moveable, belonging to the Prime Gilt Box Society of Kirkcaldy, shall be made over and conveyed to, and remain vested in, the present Provost and Bailies of the burgh of Kirkcaldy, and their successors in office, *as trustees and fiduciaries* to and for the use and behoof of the members of the Prime Gilt Box, and persons entitled to relief out of the funds thereof, as being the poor of the seafaring population of the burgh of Kirkcaldy." And after defining the persons for whose behoof the funds should be held, the report proposed, section 9, "That the affairs of the trust shall be directed and managed by a body of the *managers*. The Provost and two Bailies of the burgh of Kirkcaldy, and also the Sheriff and Sheriff-substitute of the county of Fife for the time being, shall *ex officio* be managers. The other managers shall be elected as follows." And, section 10, "On the day of , after the final interlocutor of the Court authorising the rules of the trust, the trustees, of whom two shall be a quorum, shall hold a meeting for

(b) *Steedman v. Malcolm and Ors.*, 28 June 1842, 4 D. 1441. The subsequent proceedings are narrated in a minute in the case of *Morrison*, 1 Macph. 1009.

commencing the new system of management, and shall call, by advertisement, etc., a meeting of all shipowners, etc., to be held on a day not sooner than eight nor later than twenty-one days thereafter," to elect managers of the institution for the ensuing year. CHAPTER LXVI.

2132. The Lord Ordinary (Lord Wood) approved of the above constitution and rules by the following interlocutor, dated 19 March 1845:—"The Lord Ordinary approves of the report by Mr Jameson, No. 59 of process, and of the proposed constitution and rules of the Prime Gilt Box of Kirkcaldy contained in said report, with the alterations made by the Lord Ordinary upon the tenth and eighteenth rules: Appoints the same to be the constitution and rules of the said Prime Gilt Box in all time coming; and directs the meeting, mentioned in article tenth, for commencing the new system to be held within the Town-house of Kirkcaldy, on Tuesday the 8th day of April next, between the hours of twelve and two; and decerns, and allows this interlocutor to go out, and be extracted *ad interim*." By virtue of the appointment of *trustees* and *managers* thus made by the Court, the affairs of the society have since been and still are conducted. Judgment of the Court.

2133. A similar course was followed by the Second Division in the process instituted for the administration of the bequest left by John Morgan for the endowment of an hospital in Dundee. The Court, after applying the judgment of the House of Lords, made a general remit to Professor Swinton, who reported a scheme for their consideration. (c) By that scheme—(1) A sum of £73,500 was proposed to be vested in "the Provost of Dundee, the Sheriff of Forfarshire, one of the Sheriff-substitutes of Forfarshire to be named by the Sheriff, the Dean of Guild of Dundee, and the Governor of the nine incorporated trades of Dundee, all for the time being, *as trustees* for the establishment, endowment, and maintenance in all time coming of an hospital in Dundee for the education, lodging, boarding, and clothing of a hundred boys, the sons of tradesmen, mechanics, and persons of the working class generally, whose parents stand in need of assistance to enable them to educate their families, or who are orphans in need of assistance. Any three of the said trustees shall be a quorum; and the hospital shall be known and called by the name of the Morgan Hospital." (2) So much of the sum as should not be required for the erection of the hospital, &c., "shall be invested by the said trustees, under the direction of the governors of the hospital, in good and sufficient heritable securities, or in such other securities as the trustees and Appointment of trustees for the Morgan Hospital.

(c) *Magistrates of Dundee v. Morris*, 8 Feb. 1861, 28 D. 498. The terms of the bequest are stated *supra*, § 832. Scheme of the hospital.

CHAPTER LXVI. governors may, with the sanction of the Court, in either Division thereof, from time to time approve and select; and the annual proceeds of all such investments shall be applied for the purposes of the hospital. (3) All lands, buildings, and other heritages acquired or erected for the purposes of the hospital, shall be vested in the said trustees, who shall be bound to pay the expense of acquiring or erecting the same. And the said trustees shall also be at all times bound, when required by the governors, to execute all necessary deeds and writings in connection with the management of the property vested in them, and, in particular, all mandates and other writings necessary for the receipt by the treasurer of the hospital, to be appointed as hereinafter provided, of the revenues and produce of the said property." (4) The governors "of the hospital shall be twenty in number," six being official persons,—the Provost of Dundee, etc., and the other fourteen to be elected by the Magistrates of Dundee, and other public bodies connected with the district; the general management of the hospital being vested in the governors. The scheme contains, in its after heads, various directions and rules; in particular, a regulation that "the governors shall nominate and appoint a fit and proper person to be treasurer and clerk to the hospital, to hold office during their pleasure, and shall require the person so nominated and appointed to find security for his intromissions to an extent not exceeding £1000 sterling, and shall pay him, as remuneration for his services, such an annual sum as they may think proper." There is then embodied in the report a detailed scheme of education, to be placed under the direction of the governors, together with many minute regulations as to the general management and internal polity of the hospital.

Judgment of
the Court.

2134. After a good deal of discussion the Court pronounced, upon 8th February 1861, an interlocutor, whereby they "approve of the amended scheme, No. 82 of process, authenticated of this date as relative hereto; and find and declare that said amended scheme is, and shall be, the scheme for the erection and endowment of the hospital in the town of Dundee to be called in all time coming the Morgan Hospital; and ordain the said scheme to be recorded in the books of Council and Session for preservation."(*d*)

Examples of the
appointment of
new trustees by
the Court of
Session.

1235. The *Kirkcaldy* and *Dundee* cases are examples of the appointment of original trustees. The case of *Preston*, noticed in another chapter, (*e*) is a precedent for the appointment of new trustees where the settlor's nomination has fallen by non-acceptance.

(*d*) 28 D. 495. The Court also appointed a diet for the election of trustees and governors in terms of the above-mentioned scheme.

(*e*) *Supra*, § 1801.

In the subsequent case of *Morison*, Petr., the application was for the appointment of new trustees to a school founded by private endowment, in consequence of the death of all the original trustees. The First Division, after ordering a minute of debate as to the competency of the proceeding, entertained a petition for the appointment of trustees and managers to the school, and remitted to Professor Swinton to prepare a scheme of management to be reported to the Court. (*f*) A similar appointment was made in the case of *Low*, Petr., but the Court declined to give the new trustees the power of assuming other trustees. (*g*)

2136. By the Trusts (Scotland) Act, 1867, (*h*) the regulation of charities is reserved to the Inner-House. The enactment is (section 16): "Provided that when in the exercise of the powers pertaining to the Court, of appointing trustees and regulating trusts, it shall be necessary to settle a scheme for the administration of any charitable or other permanent endowment, the Lord Ordinary shall, after preparing such schemes, report to one of the divisions of the Court, by whom the same shall be finally adjusted and settled; and in all cases where it shall be necessary to settle any such scheme, intimation shall be made to Her Majesty's Advocate, who shall be entitled to appear and intervene for the interests of the charity or any object of the trust or the public interest."

Schemes for
charities, etc.,
regulated by the
Trusts Act 1867.

(*f*) Pet. *Morison*, 30 June 1863, 1 Macph. 1009.

(*g*) *Low*, Petr., 17 Nov. 1865, 4 Macph. 45.

(*h*) 30 and 31 Vict., cap. 97.

CHAPTER LXVII.

ADMINISTRATION OF TRUSTS FOR PAYMENT OF DEBTS.

Distinction between trusts for creditors scheduled, and trusts for creditors generally.

2137. In this class of trusts the chief distinction is between the cases of trusts for behoof of creditors specified in a schedule, and trusts for behoof of creditors generally. In the former case, the object of the transaction is the creation of a security ; and therefore, if the title of the trustee be completed beyond the period of sixty days anterior to bankruptcy, the security is effectual to the creditors for whose benefit it was created. In the latter case, the principle of the trust is that of equal distribution, and the execution of the trust is equivalent to a declaration of insolvency. It will be seen that such trusts may be defeated at any time by non-acceding creditors. As the duties of the trustee are very similar in both classes of trusts, we have not thought it necessary to make a formal division of the subject on this basis ; but the distinction must be kept in view in all questions concerning the validity of the trust, and the rights of acceding creditors. (a)

Testamentary settlement may be converted into trust for creditors.

2138. I. VALIDITY OF VOLUNTARY TRUSTS.—A trust for behoof of creditors may be created either by a testamentary conveyance, or by a deed *inter vivos*. Testamentary settlements for behoof of the grantor's creditors, as the principal beneficiaries of the trust, are not of common occurrence ; (b) but if the trustee of a family settlement is aware that the estate is likely to prove insolvent, he ought to consider himself a trustee for the interest of the truster's creditors, and to preserve the surplus fund for rateable distribution. (c) However, unless the insolvency is patent, the trustee may pay *primo venienti* after the elapse of six months, subject to preferences. (d)

(a) See 2 Bell's Com., 5th ed., 486 *et seq.*

(b) See *Cooper v. Mackenzie*, 18 Jan. 1860, 22 D. 380 ; *Watson v. Johnston*, 10 April 1848, 6 Bell, 245.

(c) *Gardner v. Pearson*, 28 Nov. 1810,

F.C. ; *Young v. Johnston's Trs.*, 15 June 1841, 8 D. 1020.

(d) *Globe Ins. Co. v. Mackenzie*, 5 Aug. 1850, 7 Bell, 296 ; affirming 11 D. 618, and cases there cited ; see Act of Sd. 1662.

If the creditors agree to convert the trust as it stands into a private trust for their own behoof, he will, from the execution of an agreement to that effect, be subject to the guidance and directions of the creditors. If a voluntary arrangement cannot be effected, the safest course is to have the funds distributed under the sanction of the Court in an action of multiplepoinding or judicial sale. We may remark, however, that where any doubt exists as to the solvency of the estate of a defunct, the better course for the trustee is to decline the trust, and to allow the estate to be wound up by a judicial factor under the Bankruptcy Act.(e)

2139. The object of a private trust-settlement for creditors is usually twofold:—*First*, To accomplish a speedy and inexpensive distribution of the bankrupt's entire estate amongst his creditors in the order of their completed preferences; and *secondly*, to secure to the granter the benefits of a discharge of his debts, and protection from diligence, without exposing him to the annoyance and injury resulting from a sequestration. As voluntary trusts do not stop the acquisition or completion of preferential rights by non-acceding creditors, it may be necessary—where steps have been already taken by individual creditors—to obtain their consents to a discharge of their preferences. If the required consent is refused, the trustee must then resort to legal measures for cutting down such preferences, which he is entitled to do on the footing that the disposition *omnium bonorum* in his favour is a proof of the granter's insolvency. However, unless the great majority of the granter's creditors are likely to give in their accession to the trust, it would be useless to proceed with it; since it is in the power of any creditor qualified under the Act, immediately on the execution of ultimate diligence, to apply for sequestration of the estate, which, of course, supersedes any extrajudicial arrangement.(f)

Trust may be defeated by creditor applying for sequestration.

2140. The common law of Scotland is not unfavourable to the extrajudicial winding up of the estates of insolvents. Not long after the Act 1696, cap. 5, it came to be admitted that a debtor was entitled to make provision, by his own act, for the settlement of his affairs, provided the settlement were unqualified by reservations in his own favour, and that the rights of the creditors were left to be regulated by the law of bankruptcy.(g) But as the principles of the law of bankruptcy came to be better settled, the doctrine was recognised, that such deeds derived their efficacy from the assent of

Trusts reducible when executed within 60 days of bankruptcy.

(e) See 19 & 20 Vict., cap. 79, and Act 1199; *Watson's Crs. v. Muirhead*, 17 Nov. 1825, M. 1201; *Eyemouth's Crs.*, 1726, M. 1208, overruling *Drysdale's Crs.*, 1696, M. 1197.

(f) 19 & 20 Vict., cap. 79, § 137.

(g) *Sutherland v. Watson's Crs.*, 1724, M. 1197.

CHAPTER LXVII. creditors alone; though down to the period of the introduction of sequestration by the Act 54 George III., cap. 137, there was much fluctuation of opinion on the point,^(h) the result of which is stated by Lord Kilkerran in his report of *Snodgrass v. Beats' Crs.*, who says:—"The Lords have come and gone upon the question how far, when one is bankrupt in terms of the Statute, he can, by a general disposition to his creditors, tie them up from after diligence: and by the latest decisions it is found that he cannot."⁽ⁱ⁾ Ultimately, the House of Lords decided against the validity of trust-deeds in competition with non-acceding creditors.^(k) Since that time it has been repeatedly held that trust-deeds granted within sixty days of bankruptcy are ineffectual in competition with legal diligence;^(l) though, where the challenge is deferred until after the trustees have entered upon a course of beneficial administration, the Court will not allow their management to be interfered with until matters are put in train for judicial settlement.^(m)

Reduction of trust-deeds under Statute 1621, c. 18.

2141. Irrespective of the operation of the modern Bankruptcy Acts, trust-deeds were liable to be cut down after the lapse of sixty days from their date, as being in defraud of the diligence of non-acceding creditors, and in virtue of the Act 1621, cap. 18. The right of challenge under the second branch of this Statute is founded on the creditor's interest to have his diligence completed without suffering any interruption from the voluntary act of the debtor. The Statute was held to apply equally to trust-deeds as to individual preferences, for the obvious reason that the creditor's interest to follow out his diligence was not less materially abridged by the operation of a trust than by that of a deed in security; for such arrangements, however beneficial to the common interest, could not be allowed to operate to the injury of the individual creditor who had availed himself of the means provided by the law for attaching the property of his debtor.⁽ⁿ⁾

Trust may be defeated by the execution of ultimate diligence;

2142. In virtue of the existing Bankruptcy Act,^(o) which in this respect is based upon previous legislative provisions,^(p) in-

^(h) *Smees & Co. v. Anderson's Crs.*, 1734, M. 1206; *Earl of Aberdeen v. Lewis*, 1736, M. 1208; *Jackson v. Simpson*, 1757, M. 1212; *Leith v. Livingston*, 1759, M. 1212; *Wilson v. M'Vicar*, 1762, M. 1214; *Jamieson v. Coutts & Co.*, 1768, M. 1216; *Mudie v. Dickson*, 1764, M. 1104.

⁽ⁱ⁾ *Snodgrass v. Beats' Crs.*, 1744, M. 1209.

^(k) *Peters v. Spiers*, 18 Dec. 1767, M. 1218; *Johnston v. Fairholme's Crs.*, 1770, M. "Bankrupt," App. No. 5.

^(l) *Hutchinson v. Gibson*, 1791, M. 1221; *White v. Watson*, 1808, Hume, 649; *Munro v. Fraser*, 5 Br. Sup. 385.

^(m) *Kerr v. Graham's Trs.*, 17 Nov. and 21 Dec. 1827, 6 Sh. 73, 270.

⁽ⁿ⁾ *Farquharson v. Cumming's Crs.*, 1729, M. 1205; and see *Mansfield v. Brown*, 1785, M. 1207; *Wardrop v. Fairholme*, 1744, M. 4860.

^(o) 19 & 20 Vict., cap. 79, § 7-15.

^(p) 54 Geo. III., cap. 137; 2 & 3 Vict., cap. 41; 16 & 17 Vict., cap. 53—now repealed.

solvency (of which the execution of a trust-deed *omnium bonorum* CHAPTER LXVII. is legal evidence), coupled with the execution of ultimate diligence, etc., is notour bankruptcy, and entitles the creditors, or the bankrupt, with concurrence of a creditor or creditors possessing the requisite qualification, to apply for sequestration of the estate; and accordingly, even where the estate has been effectually vested in trustees by infestment and tradition of moveables, it may be taken out of his person at any time within four months of insolvency by the operation of the vesting clause of the Bankruptcy Act. (q)

2143. It may easily happen, from the circumstance of there being no diligence begun prior to the trust, or otherwise, that the reductive provisions of the Acts 1621 and 1696 are inapplicable. The operation of the Bankruptcy Act, again, may be excluded, in the event of no qualified creditor coming forward to apply for sequestration. Even in the case supposed, however, the trust is still liable to be defeated at the instance of non-acceding creditors resorting to the process of judicial sale, to which the subsistence of a voluntary trust is no bar. (r) Trusts which are not so framed as to confer preferences on individual creditors, may be defeated indirectly at any time by non-acceding creditors. The principle of the trust is equal distribution; and any creditor, by resorting to any diligence under which he may obtain payment, will render the trust ineffectual by defeating its purposes. (s) Subsequent creditors, however, cannot interfere; they can only attach the reversionary interest. (t) or by action of judicial sale; or by creditors pursuing separate measures.

2144. II. CONSTITUTION OF TRUSTS FOR PAYMENT OF DEBTS.—A trust-conveyance for behoof of creditors may be constituted by the act of the insolvent himself, either without or with the assent of his creditors. In the former case, the granter must execute the settlement unconditionally, and take the risk of a reduction; in the latter, he will naturally stipulate for the usual terms of personal protection and ultimate discharge,—which, in strict form, ought to be embodied in a relative deed of accession, to be executed by the creditors; for, it is said, if the conditions in the bankrupt's favour are made to flow from his own act, the proceedings are liable to be swept away at the instance of any recusant creditor who may Trust-conveyance must be unconditional, unless creditors are parties. Effect of a stipulation for discharge.

(q) 19 & 20 Vict., cap. 79, §§ 15 and 102. The same result had been arrived at by judicial construction of former Statutes: *Earl of Kellie v. Crawford*, 28 Feb. 1821, F.C.; 18 Nov. 1821, 1 Sh. 128, N. E. 126, *Lockie v. Mason*, 14 Feb. 1837, 15 Sh. 547.

(r) *Cruttenden v. Rattray*, 2 Dec. 1824, 3 Sh. 347, N. E. 247.

(s) *Earl of Breadalbane v. M'Donald*, 16 Jan. 1824, 2 Sh. 621, N. E. 529; *Colville's Crs. v. Colville's Trustee*, 1779, M. 1221; *Leith v. Livingstone*, 1759, M. 1212.

(t) *Campbell v. Edderline's Crs.*, 14 Jan. 1801; M. "Adjudication," App. No. 11; *Herries, Farquhar, & Co. v. Burnett*, 20 Nov. 1846, 9 D. 111.

CHAPTER LXVII. choose to withdraw from the arrangement.(u) In practice, however, it is usual to stipulate in the trust-deed, that creditors taking benefit under it discharge the debtor. This, in the case of simple trusts, is held to obviate the necessity for a separate deed of accession. As a check upon the prosecution of separate measures, a power is also given to the trustee, in the event of any of the creditors declining to accede, to apply for sequestration of the estate under the Bankruptcy Act.

Form of the
trust.
Ex facie abso-
lute disposition.

2145. As regards the form of the deed of trust, it is essential that it should contain *in gremio* a perfect legal transference of the insolvent's whole estate to a trustee, upon which the latter may complete a title according to the rules of conveyancing. It is not unusual to insert a destination to heirs and assignees; a better form of destination is to take the conveyance to two or more trustees in succession.(x) As we remarked, in treating of trusts for sale,(y) a convenient form of trust-conveyance is that of an absolute disposition, accompanied by a back-bond of trust in favour of creditors for their respective interests, expressing the purposes of the conveyance, and containing a clause of registration for execution against the trustee. The chief advantage of this form is, that it enables the trustee to give an unimpeachable title to purchasers, absolving them from any concern with the purposes of the trust or with the application of the purchase-money. But the same objects may be accomplished by a regular trust-deed with ample powers, which is less expensive, and, unless in very large trusts, is the form generally used in practice.

Disposition in
trust the pre-
ferable form.

Purposes of the
trust.

2146. If the form of an ordinary trust-disposition is adopted, it will contain the purposes usual in settlements for creditors, which are—the sale of the debtor's whole estate, the payment of his just and lawful debts, and the retrocession of the debtor and his heirs. In the case of trusts for the benefit of individual creditors, there is an advantage in specifying the debts so far as known, which may be done by reference to a schedule; the truster being bound, of course, by his admission of liability to the extent of the debts thus set forth.(z) A disposition to the creditors directly as joint *pro indiviso* disponees is open to the objection that it does not provide for the administration of the property, or for bringing in other creditors who may afterwards appear. It is, however, usual and

Powers of
creditors or
committees.

(u) *Grant v. Cunningham*, 1747, M. 1210; *Sutherland v. Watson*, 1724, M. 1199. See Bell's Com., 6th ed., 1173.

(x) Chap. 56, sect 1.

(y) Chap. 64, sect. 1.

(z) *Wotherspoon v. Winning*, 18 Jan.

1849, 11 D. 371; *Ettles v. Robertson*, 15 Feb. 1838, 11 Sh. 397. See 7 W. & S. 176. The enumeration of debts does not change their nature from moveable to heritable; *Hawkins v. Hawkins*, 28 May 1848, 5 D. 1085, overruling Ersk. 2, 2, 15.

proper in trust-deeds for payment of debts, to name a committee of creditors to advise with the trustee. CHAPTER LXVII.

2147. It is, of course, proper to secure the acceptance of the trustee before the completion of the settlement; though it would seem, on the analogy of family settlements, that his non-acceptance does not destroy the radical interest of the creditors as beneficiaries, or deprive them of the preference which the execution of a settlement in their favour gives over creditors claiming on debts posterior to the date of its execution. (a) In the event of the death of the trustee, the estate may be taken up by his heir, serving as heir of provision *pro forma*, for the purpose of conveying the estate to the creditors, or to a new trustee for their behoof. (b) If there be no destination to the heirs of the trustee in the settlement, the process of declaratory adjudication will be available for the purpose of reinstating the truster and his creditors for their respective interests. The deed of settlement should contain a power in favour of the creditors of electing a new trustee or trustees if necessary. (c) If the vacancy is caused by resignation, the estate will be transferred to the new trustee by a deed of devolution, to be executed by his predecessor. If it is caused by death, the title may be made up by declaratory adjudication.

Trust subsists notwithstanding failure of the trustee.

Mode of providing against a lapse.

2148. Although the trustee's title of administration is liable to be defeated by judicial proceedings at the instance of non-acceding creditors, it is to be understood that any real right which he may acquire for the benefit of his constituents will enure to them, notwithstanding the supercession of the trust; and will, if completed before the acquisition of a real right on the part of non-acceders, confer a preference on the creditors for whom the trustee acts. On this account, it is of the utmost importance to the interests of the trust that the trustee should lose no time in completing his title to the property and effects of the bankrupt which are the subject of the disposition in his favour. For it will be observed, that the result of the competition between the trustee, as holding for the general body of creditors, and the non-acceding creditors pursuing separate measures, depends upon priority in the completion of the title; that is, upon priority of infeftment in the case of heritage, and of delivery or intimation in the case of personal property.

Preferences acquired by trustee subsist, although the administration stopped by non-acceding creditors.

(a) See the cases of *Dallas v. Leishman*, 1710, M. 16,191; *Campbell v. Monzie*, 1752, M. 14,703; and cases on Acceptance, chap. 55, sect. 1.

(b) The creditor's right of action transmits against the trustee's heir; *Duke of*

Hamilton's Cr. v. Earl of Selkirk, 1740, Elch. "Trust," No. 9.

(c) See *Earl of Lauderdale v. Earl of Fife*, 9 March 1830, 8 Sh. 675. *Quære*, Can the Court grant authority in case of necessity for the election of a new trustee? See *Pet. Mitchell*, 28 Jan. 1860, 22 D, 682.

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Completion of trustee's title.

Where truster is infeft.

2149. The following suggestions as to the means to be pursued by voluntary trustees in order to secure a preference in bankruptcy, are adapted, with some additions and modifications, from Mr Bell's chapter on Trust-Deeds for Creditors.(d) When the truster is feudally infeft, there can be no difficulty in the ordinary case. The trustee, by the debtor's conveyance, acquires right to the estate, and his title is completed by recording the disposition in the Register of Sasines. The only case which calls for special notice, is that in which the creditors stand opposed to a purchaser possessing on a minute or missive of sale or a disposition in the old form, without precept or procuratory. As the purchaser is in law only a creditor for the value of the property, it will be the duty of the trustee acting for the other creditors to endeavour to gain a complete title, which may disappoint the hopes of the purchaser, and bring him in only as a creditor among the rest. The conveyance in favour of the trustee gives him the same right as the purchaser, and the party who gets the first adjudication in implement will have a preferable right to the estate.

Where truster not infeft, trustee takes *tantum et tale*.

2150. Where the truster is not infeft, two cases may be distinguished: one, where he holds by singular titles; the other, where he has succeeded to the estate. If, in the former case, the truster possessed on an unrecorded conveyance, the trustee, by virtue of the general assignation in his favour, may complete his title by recording both instruments. In this case the trustee, not being an onerous assignee, can only take the debtor's interest *tantum et tale*.(e) It sometimes happens that the debtor has burdened his estate, and that the conveyance to the purchaser or creditor has been put upon record as a *de me* conveyance, while the debtor himself was not infeft. If the creditors allow the debtor's title to be completed by registration, the infeftment will accresce to the right already granted, which will thereupon become a complete and preferable right.(f) The trustee must therefore pass over the debtor, and take infeftment on an assignation to the debtor's title; by which means the infeftment already taken on the other conveyance will become ineffectual.

Where truster possesses on apparenacy.

2151. If the debtor has succeeded to his ancestor, and his title be not yet completed, the trustee must proceed to complete the title, either by service of the debtor as heir to his ancestor, or by notarial instrument in his own favour upon the ancestor's general disposition, as the state of the title may require. If the debtor's

(d) Shaw's Bell's Com. 1174.

Pat. 707, with *Dingwall v. M'Combie*, 1 Sh.(e) Compare *Redfearn v. Somervail*, 5

468, N. E. 481.

(f) Stair, 8, 2, 1; Ersk. 2, 7, 8.

title-deeds have been deposited, subject to a lien, the trustee cannot enforce delivery, except under reservation of the preference thereby created; but if they have been delivered to him under reservation of preferences, and the trustee, on considering the matter, should decline to take up the property, he is not deemed to have made such use of the documents as would oblige him to recognise the lien. (g)

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How far agent's lien gives a preference.

2152. III. ACCESSION BY CREDITORS.—Accession may either be declared by deed or implied from circumstances. In the former case, the acceding creditor is bound by his subscription, or by that of a mandatory authorised to act for him, to certain conditions in favour of the insolvent; (h) amongst which the most usual are, a consent to a *supersedere* of diligence, or a delegation of the creditor's power over the debtor to the trustee, and an agreement that if, after a certain time, dividends shall have been paid to a specified amount, the debtor shall be entitled to a discharge as to his personal liberty and future acquisitions, or that he shall be discharged of all his debts by the assent of a certain proportion of the creditors. By the deed of accession the trustee is also clothed with the necessary powers of management, which embrace such of the functions of the trustee in a sequestration as may be thought appropriate; and the creditors bind themselves to observe all the rules of a sequestration. The deed may also reserve powers of assumption, and authority to compel the resignation of the trustee in the event of his delaying the execution of the trust unreasonably.

Express accession by deed or instrument in writing.

2153. Accession may also be inferred from facts and circumstances inconsistent with the supposition of an intention on the part of the creditor to resort to separate measures for the acquisition of a preference. The subscribing of an agreement or minute of meeting of the creditors would, on the ordinary principle of *rei interventus*, be sufficient to bar a creditor from resiling. The law of accession, however, is in this respect unusually favourable to the general interest of the creditors, insomuch that the mere attendance of a creditor at a meeting at which common measures are resolved upon, without expressing dissent; acknowledgment of the trustee, by purchasing from him; (i) or such other acts indicative of acquiescence as are likely to deceive the other creditors into the

Accession to trust may be inferred from circumstances.

(g) *Rennie & Webster v. Myles*, 8 Feb. 1847, 9 D. 626.

(h) *Gibson v. Macdonald*, 7 Dec. 1824, 8 Sh. 874, N. E. 268.

(i) Compare *Globe Insurance Co.*, 16 D. 1030, with opinions in same case, 7 Bell, 296, and 11 D. 618; *Lea v. Landale*, 15

Jan. 1828, 6 Sh. 350; *Lyell v. Christie*, 11 March 1828, 2 Sh. 288, N. E. 253; *Larkin v. Smith*, 1 July 1824, 3 Sh. 200, N. E. 140; *Croll's Trs. v. Robertson*, 1791, M. 12,404; *Campbell v. Simpson*, 1791, M. 11,688.

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belief that they are taking him along with him, may be stated as a relevant objection to any separate proceeding on the part of the creditor.(k) But a mere tacit recognition of the trustee, as by allowing decree to pass in absence in a suit at the instance of the trustee for a debt due to the constituent, amounts to nothing more than a *non repugnantia*, and does not imply accession.(l)

Accession *rebus et factis* does not import assent to conditions of the trust.

2154. But although circumstances indicating an approval of the proceedings may be received in evidence of accession to the extent of recognising the trustee's title to administer, a consent to conditions in favour of the insolvent will not be so easily implied. Thus, in *Heriot v. Farquharson* it was observed, that the Court is at liberty to consider the nature and effect of the contract to which the creditor is said to have acceded, and that the circumstances from which the accession is attempted to be inferred will naturally be taken with more scruple if the contract is attended with hardship, than in the case where its sole effect is to introduce equality among the creditors, and to prevent unjust preferences; and accordingly, the Court found in that case that there was sufficient evidence of the pursuer's accession to the trust-disposition, but "found no evidence that he acceded to the deed of accession relative to the said trust-deed, or that he is bound thereby."(m)

Examples of the rule.

2155. Obligations to accept of a composition, to compromise claims, or to submit questions of ranking and preference to arbitration, will not, as a rule, be held binding upon a creditor constructively acceding, but must be proved against him by evidence of special agreement to such conditions.(n) Yet, even as regards conditions in the insolvent's favour, the principle of *rei interventus* may have place in the absence of more formal evidence of assent. And accordingly, if the friends of the bankrupt, for the sake of procuring the accession of other creditors to an amicable arrangement, agree to relinquish securities, or to suspend the execution of diligence, creditors who listen to such proposals, and take the benefit of the proffered concessions, will not be allowed to plead that they have not made themselves parties to the deed.(o)

(k) *Anderson v. Starkie & Co.*, 2 March 1818, F.C.; *Heriot v. Farquharson*, *infra*.

(l) *Mackie v. Mackinnel*, 6 June 1822, 1 Sh. 465, N. E. 488.

(m) *Heriot v. Farquharson*, 27 June 1766, M. 12,404.

(n) *Thomson v. Dudgeon*, 20 Feb. 1855, 17 D. 455; *Heriot v. Farquharson*, *supra*; *Blyth v. Chisholm*, 2 March 1888, 11 Sh. 512.

(o) See also on this subject the follow-

ing cases; *Campbell v. M'Donald's Trs.*, 3 July 1829, 7 Sh. 826; *Mills v. Hamilton*, 1 Dec. 1880, 9 Sh. 110; *Bell v. Morton*, 31 May 1881, 9 Sh. 651; *Kerr's Trs. v. Russell*, 15 Dec. 1882, 11 Sh. 219; *Hamilton v. D. of Queensberry's Exrs.*, 21 June 1884, 12 Sh. 766; *Jopp v. Sir A. L. Hay*, 22 Dec. 1844, 7 D. 260, where accession was not inferred. But see *contra*, *Brisbane's Trs. v. Crawford*, 8 Feb. 1826, 4 Sh. 422, N. E. 427; *Borthwick v. Shepherd*, 18 Nov. 1882, 11

2156. The question is raised by Professor Bell, *(p)* whether the contract implied in accession has relation to the person of the creditor or to his claim? that is, whether, on the one hand, the assignee of an acceding creditor is bound by the accession of his cedent, or, on the alternative supposition, whether an acceding creditor may disclaim his accession to the trust in reference to debts which he may subsequently acquire? Professor Bell answers both questions in the affirmative, holding that accession binds the person of the creditor as regards future purchases, and also that assignees are bound by such personal exceptions as are pleadable against the cedent. *(q)* But he is of opinion that a general accession would not prevent a creditor from resorting to diligence for securing a right of succession, or other unforeseen acquisition.

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How far accession binding on the creditor personally and on assignees.

2157. The accession of creditors to a voluntary trust is qualified by the implied condition that other creditors shall also accede. If, therefore, any of the creditors stand aloof and refuse to join in common measures against the debtor, an acceding creditor is entitled, for his own protection, to proceed with separate diligence notwithstanding his accession. *(r)* If an acceding creditor have already received his dividend and discharged the insolvent, he has no title to interfere with the pursuance of separate diligence by others. *(s)*

Accession conditional on consent of other creditors being obtained.

2158. The principle of equal distribution is a necessary condition of all voluntary arrangements between creditors and their debtor; and therefore, any advantage promised or given to individual creditors, for the purpose of procuring their assent, will be a sufficient ground for setting aside the arrangement, at the suit of the trustee or any other of the creditors,—whose lawful interests in the estate are necessarily diminished in the same degree as that of the favoured creditor is increased. *(t)* The case of *Anderson v. M'Nair & Brand* is an example. *(u)* The defenders, who were in the habit of making advances on the shipments of a firm trading between Glasgow and Singapore, became parties to an arrangement under which the estate of the latter was to be wound up by a liquidator and a committee of creditors, by whom all remittances, whether for general or special account, were to be received. Subsequent to the date of this arrangement, a shipment having arrived at Glasgow,

Unfair preferences, etc., entitle creditor to resale.

Sh. 1; *Littlejohn v. Hamilton*, 2 S. & M'L. 855, reversing, 11 Sh. 701, where accession was inferred.

(p) Shaw's Bell's Com. 1180.

(q) *Dick v. Murison*, 13 Nov. 1845, 8 D. 1.

(r) *Jopp v. Hay*, 22 Dec. 1844, 7 D. 260, and cases there cited.

(s) *Blyth v. Chisholm*, 2 March 1833, 11 Sh. 512.

(t) *Mack v. Jenkins*, 25 Nov. 1414, F.C.; *Arrol v. Wight*, 29 May 1810, cited, Bell's Com. 2, 505, 6th ed. 1188; see the English cases in Smith's Mercantile Law, 727.

(u) *Anderson v. M'Nair & Brand*, 14 Jan. 1859, 21 D. 257.

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the defenders, in pursuance of their ordinary course of dealing, granted an acceptance to account of the value of the cargo, receiving the bills of lading in security. The defenders refused to give up the bills of lading on being relieved of their acceptance, and insisted on their right to retain in security of previous advances; and the trustee thereupon applied for an interdict against the negotiation of the bills of lading, on the ground that their retention by the defenders was an illegal preference, and contrary to the good faith of the agreement. The Court granted interdict as craved.

Consent of acceding, no bar to reduction by non-acceding creditors.

2159. Although a trustee has been expressly authorised by the general body of the creditors to give an advantage to creditors of a particular class for the sake of purchasing their adhesion—as, for example by giving heritable creditors a *joint* preference over all the lands to which their several securities extend—such authority will be no answer to a personal action at the instance of non-acceding creditors claiming their equitable share of the insolvent's estate.(x) In practice it is not unusual to authorise the trustees to pay creditors in full, whose debts are below a certain amount.

Clause determining trust in default of accession.

2160. The trust may be invalidated by the operation of a clause in the trust-deed, or relative deed of accession, declaring that it shall be void in the event of the creditors not acceding within a certain time. But it appears that the Court of Chancery, upon grounds which would probably be recognised in our Courts, will support a voluntary trust, if, prior to the institution of a suit, the creditors have in point of fact assented to it, or acquiesced in it, although the condition as to time has not been strictly complied with.(y)

Trusts of part of the granter's property for payment of his debts.

2161. If a debtor assign his property, in whole or in part, in trust for certain of his creditors, and if the transaction be fair and *bona fide*, it will be sustained; for he is entitled to create a security in the form of a trust. But such conveyances are reducible under the second branch of the Act 1621, cap. 18, if granted after the contraction of debt, and after diligence has been begun.(z) Such trusts will, of course, be liable to reduction under the Act 1696, cap. 5, if granted within sixty days of notour bankruptcy.

Completion of title and prevention of preferences.

2162. IV. GENERAL ADMINISTRATION OF THE TRUST.—Among the first duties which devolve upon a trustee appointed to administer an estate for behoof of creditors, are the completion of a title in his person, the securing of the assent of other creditors as far as prac-

(x) *Mansfield v. Young's Tr.*, 30 Nov. 1843, 6 D. 146. The rule is different in a sequestration, where the resolution of the majority binds; see *Gray v. Fraser*, 6 Feb. 1850, 12 D. 684.

(y) *Spottiswoode v. Stockdale*, G. Coop. 102.

(z) See Bell's Com. 6th ed. 1138. and cases *infra*, § 2167.

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 ticable, and the institution of proceedings for cutting down or vacating illegal preferences and the diligence of creditors pursuing separate measures. Of these we have already spoken. The trustee must satisfy himself, at his own risk, as to the validity and extent of his constituent's title to the estate; taking care, for example, if the truster's interest is limited to a liferent, not to pay dividends or incur obligations beyond the value of the income. Sometimes a trust contemplates the raising of a fund by policies of life assurance, the premiums being payable out of the revenues of the estate. In this case the trustee may safely undertake the duty of receiving and distributing the fund, and of keeping up the policies in so far as the rents are sufficient for the purpose. But he will be liable to the fiar or next heir for any intromissions with the rents after his constituent's decease; the plea of *bona fide* possession being inapplicable to the case.(a)

2163. The duties next incumbent upon the trustee are those of realising the moveable estate, and bringing the heritage to sale by public auction. By his title as legal proprietor of the estate, the trustee is clothed with all usual and necessary powers of administration, so that he may pursue and defend actions on behalf of the insolvent without the consent of the latter,(b) and may accept or renounce leases, or heritable succession, in which the insolvent had an interest.(c) To avoid repetition, we refer, on the subject of realisation and management, to a previous chapter, in which the general duties of trustees of heritable and moveable estate are discussed.(d)

2164. With regard to prohibitory diligence, the duties of the trustee will be regulated by the provisions of the Bankruptcy Statutes of 1856, relating to arrestments and sales of heritable property. By the 12th section of the General Bankruptcy Act,(e) all arrestments and poindings used within sixty days before, or four months after notour bankruptcy, are to be ranked *pari passu*, among which are included arrestments on the dependence, provided the proceedings are completed without undue delay. Creditors producing a liquid ground of debt in a furthcoming or other action relative to the subject of arrestment or poinding, may be ranked as if they had executed diligence; and creditors who have already obtained payment may be compelled to refund. Arrestment used subsequently to the expiry of the period of four months,

(a) *Justice v. Ross*, 21 Nov. 1829, 8 Sh. 108.

(b) *Carrick v. Hutchison*, 11 June 1844, 6 D. 1148.

(c) *Williamson v. Johnstone*, 23 Dec. 1848, 11 D. 332.

(d) Chap. 63, sect. 1.

(e) 19 & 20 Vict., c. 79, § 12.

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gives security only over the reversion. Inhibition may be discharged by bringing the property to a judicial sale, or by means of an adjudication in the name of the trustee for behoof of the creditors, or by a joint adjudication in name of the creditors themselves.^(f) The accession of an inhibiting creditor is not a sufficient authority to the trustee to proceed with a private sale unless the preference be expressly discharged.^(g) By the Act 19 & 20 Vict., cap. 91, purchasers at judicial sales are empowered to consign the purchase-money in bank for behoof of all having interest. Arresters of the equitable interest under a testamentary trust are not bound by the rules of diligence which are applicable to trusts for behoof of creditors.^(h)

Trustee may be empowered to decide questions of ranking.

2165. Where a trustee is empowered to decide as an arbiter upon the validity of claims, or to determine questions of preference, he must be guided by the rules of Bankruptcy. But though the Court will endeavour as far as possible to withdraw the rights of the creditors from the caprice of the trustee, it cannot review his judgments on the merits, if he has been lawfully invested with the powers of an arbiter. It will be the duty of the trustee, in any event, to act upon strictly legal considerations, taking legal advice when necessary.

Liability of the trustee for losses and breach of trust.

2166. The trustee is bound by the law of the contract to lodge all monies received on account of the trust in bank, in a separate account.⁽ⁱ⁾ If the funds appropriated to the payment of a current dividend are retained by the trustee in his own hands, and he fails, it would seem that the loss falls exclusively upon those creditors who have not already received payment, and that they will not be entitled to an equalising dividend out of funds afterwards recovered.^(k) The trustee will be personally responsible for dividends which he may have omitted to pay to a creditor whose claim has not been formally disallowed.^(l)

Voluntary trusts contemplate the benefit of existing creditors only.

2167. V. PAYMENT OF THE TRUSTER'S DEBTS.—In the case of a trust *inter vivos*, the estate is vested in the trustee for the benefit of all the creditors in debts contracted prior to the date of execution;^(m) consequently, it is not a good defence to a claim made at any time before the final distribution, that the creditor had not

(f) See 19 & 20 Vict., c. 91, as to Sales and Adjudications in Bankruptcy.

(g) *Munro v. Gordon's Crs.*, 1777, M. "Inhibition," App. No. 1.

(h) *Globe Ins. Co. v. Mackenzie*, 5 Aug. 1850, 7 Bell, 296; affirming 11 D. 618. See 16 D. 1080; Act of Sederunt 1662.

(i) *Macfarlane v. Cranstoun*, 12 Dec. 1828, 2 Sh. 578, N. E. 496.

(k) Bell's Com. 1181, 5th ed. 2, 508.

(l) *Ure v. Jeffrey*, 2 Sh. 646, N. E. 545; 21 June 1825, 1 W. & S. 565.

(m) Unlike a private trustee, who may pay *primo venienti*; see chap. 63, sect. 3.

given in his accession.(n) Postponed creditors may attach the re-
versionary interest by adjudication directed against the truster or
his heirs—not against the trustee.(o) If the reversion has been
disposed of, they have no remedy against the estate.(p) In trusts
constituted by testamentary settlement for payment of 20s. in the
pound on debts already discharged, the direction has been held to
include all debts incurred prior to the testator's death; and there is
no lapse though a creditor die before the testator.(q) Sickbed and
funeral charges and mournings are preferable debts at common
law.(r)

2168. Trusts for the payment of debts already discharged seem to be subject to the same rules of interpretation as onerous trusts for behoof of creditors. Thus, where a truster burdened his heritable estate with payment of “all just and lawful debts contracted by the said A. B., my son, and resting owing at his death, in so far as these debts shall not be extinguished during my life,” the estate was held to be burdened with all debts of whatever nature due by the son, including the debts of the truster himself, for which the son was only liable *subsidiarie*.(s) And where a party who had been in indigent circumstances, but afterwards came into an estate, conveyed it to trustees with a direction to pay all debts for which she was “bound in law or equity or in conscience,” the Court held that this would include a recompense for aliment, as this was a debt for which the truster was under a natural obligation to grant a recompense.(t) In another case, the debtor's widow had assigned the surplus rents of her own estate to trustees for behoof of her husband's creditors, on the understanding (which was not expressed in the deed of assignment) that the debts would be paid off in five years. It was held, notwithstanding, that the creditors were entitled to apply the rents in extinction of their claims, until the whole debt had been paid off.(u) Where trustees have power, either by express grant or by implication, to sell heritage for the

Trusts for pay-
ment of debts
in full.

Trustee bound
to exercise
power of sale
where realised
assets are in-
sufficient.

(n) *Innes v. Russell*, 1794, Bell's Fol. Ca. 27 and 8.

(o) *Barbour v. M'Minn*, 7 July 1826, 4 Sh. 806, N. E. 813; *Herries, Farquhar, & Co. v. Burnet*, 20 Nov. 1846, 9 D. 111.

(p) See *Mackenzie v. Smith*, 26 June 1861, 23 D. 1201; *Turnbull v. Turnbull's Trs.*, 15 April 1825, 1 W. & S. 80; *Wright v. Harley*, 2 June 1847, 9 D. 1151.

(q) *Cooper v. Mackenzie*, 13 Jan. 1860, 22 D. 880; *Watson v. Johnston*, 10 April 1848, 6 Bell, 245.

(r) *Webster v. Alexander*, 15 Feb. 1859, 21 D. 509; *Glass v. Weir*, 23 Nov. 1821,

1 Sh. 163, N. E. 156; *Douglas v. M'Clymont*, 11 Dec. 1802, Hume, 454.

(s) *Stuart v. Campbell*, 6 Feb. 1852, 14 D. 443.

(t) *Easton v. Newlands' Trs.*, 17 Jan. 1822, 1 Sh. 244, N. E. 232. See the following English cases on this class of trusts: —*Turner v. Martin*, 7 De Gex, M'N. & G. 429; *Sowerby's Trust*, 2 K. & J. 630; *Philips v. Philips*, 8 Hare, 281.

(u) *Rundell & Co. v. Montgomerie*, 15 April 1825, 1 W. & S. 112, reversing 2 Sh. 207, N. E. 184.

CHAPTER LXVII. purpose of paying off debts affecting the estate, it is their duty to execute the power, and not to allow the debt to remain a burden upon the property.(x)

Whether a trust for payment of debts interrupts prescription.

Blair v. Horne.

Benefit of trust cannot be restricted to creditors acceding within a certain time.

2169. As to the effect of a trust for payment of debts in interrupting prescription, the principle, which is the same in both parts of the kingdom, is very distinctly stated by Mr Lewin,(y) who observes, that while a trust will not revive a debt barred by the Statute of Limitations,(z) yet, if the debt be not barred when the trust comes into operation, the Statute will not run afterwards; for, as was observed by the Court in *Hughes v. Wynne*, it is not to be inferred that a man abandons his debt because he does not enforce his claim at law, when he has a trustee to pay for him.(a) In the Scotch case of *Ettles v. Robertson*,(b) where the amount of a bill debt was specified *inter cætera* in the deed of trust, it was held that the sexennial prescription had been interrupted by the debtor's acknowledgment; but in the later case of *Blair v. Horne*,(c) where the names of the creditors only were specified in the deed of trust, without mention of particular debts, and payment was to be made in two instalments of twelve and twenty-four months, the Court repelled the plea of interruption of prescription, in an action against the trustees upon certain promissory notes upon which prescription had not run at the commencement of the trust. In consequence of this decision (which we think unsound), creditors on bill debts of old standing cannot be recommended to become parties to private deeds of arrangement or composition contracts, unless they obtain an acknowledgment under the hand of the debtor or his trustee amounting to an effectual reconstitution of the debt.

2170. Mr Bell has remarked that it does not seem to be a valid condition of a trust professing to be in consideration of insolvency, that the benefit of payment shall be restricted to those creditors who enter their claim within a certain time;(d) and his opinion has received confirmation from two recent Chancery cases, in which it was held by Vice-Chancellor Wood, and afterwards by Lord Chancellor Campbell, that a creditor who had not acceded within the prescribed time might claim the benefit of the trust.(e)

(x) *Graham v. Graham's Trs.*, 21 Dec. 1850, 13 D. 420.

(y) Lewin on Trusts, 5th ed. p. 387.

(z) *Burke v. Jones*, 2 V. & B. 275, where all the cases are collected.

(a) *Hughes v. Wynne*, 1 T. & R. 807, 809; *Crallam v. Oulton*, 8 Beav. 1, 9 L. J. Ch. 819; *Hargreaves v. Michell*, 6 Mad. 326; *Fergus' Exrs. v. Gore*, 1 Sch. & Lef. 107.

(b) *Ettles v. Robertson*, 15 Feb. 1833, 11 Sh. 397.

(c) *Blair v. Horne*, 30 Nov. 1858, 21 D. 45.

(d) Bell's Com. 1172, 5th ed. 2, 488; and see *Innes v. Russell*, 1794, Bell's Fol. Ca., 27 & 8.

(e) *Whitmore v. Turquand*, V.-C. Wood, 1 Johns. & H. 444; 3 De G., F. & J. 107;

2171. After the purposes of the trust have been fulfilled, the truster is entitled, in virtue of his reversionary interest, to call upon the trustee to denude in his favour; and that right may be adjudged by posterior creditors. If the trustee should defer or become disabled from proceeding with the execution of the trust, there is a clear legal interest both in the truster and the creditors to enforce the fulfilment of the trust-purposes by other means; which may be accomplished either by applying for the appointment of a factor, or by obtaining judgment in a declarator decerning the trustee to convey to a purchaser, or to another trustee to be nominated by the constituents. *(f)* As regards heritable estate, if the title has been entirely taken out of the truster (which seems to be the effect of an *ex facie* absolute conveyance), a reconveyance or adjudication will be necessary to reinvest the granter; but a trust declared *in gremio* of the deed is regarded as a real burden, which may be extinguished by discharge, the granter's title meanwhile standing complete on his previous investiture. *(g)*

Reversionary interest of the truster and of posterior creditors.

Distinction between *ex facie* absolute titles and burdens.

2172. A trustee for creditors, denuding in favour of a truster who is insolvent, is guilty of a fraud upon his constituents, and renders himself liable to an action of damages at the instance of any creditor whose claim has been neglected; the damage being measured by the amount which the pursuer might have recovered had the trust-estate been made available to him. *(h)*

Trustee cannot denude in fraud of interests of creditors.

2173. Voluntary trusts for creditors are, in the majority of cases, wound up by composition contract, which is in effect an agreement between the truster and his creditors that the former shall, at a particular time or times, pay a definite proportion of all his debts, in consideration of which the debts are to be discharged. The contract is held to be qualified by the same implied conditions which enter into the constitution of trusts *omnium bonorum*: First, that all the creditors shall be dealt with equally; *(i)* and secondly, that the accession of the individual creditor is only to take effect when the rest shall have concurred. *(k)* Composition contracts may either be constituted by deed, or, like other writings *in re mercatoria*, by

Conditions of contracts of composition.

Raworth v. Parker, 2 Kay & J. 170; and see *Dunch v. Kent*, 1 Vern. 260.

(f) See *Allan v. M'Crae*, 1792, Bell's Oct. Ca., 538; *E. of Lauderdale v. E. of Fife*, 9 Mar. 1830, 8 Sh. 675.

(g) *Campbell v. Edderline's Cr.*, 1801, M. "Adjudication," App. No. 11.

(h) *Mackenzie v. Thomson*, 12 Nov. 1846, 9 D. 35.

(i) *Aitken v. Graham*, 8 July 1845, 7 D.

996; *Arrol v. Wight*, 29 May 1810, reported in Bell's Com. 1183; 5th ed. 2, 505; *Robertson v. Ainslie's Trs.*, 13 July 1837, 15 Sh. 1299.

(k) *Brown v. Macintyre*, 1 June 1830, 8 Sh. 847; *Johnstone v. Carson*, 20 Feb. 1823, 2 Sh. 229, N. E. 203; *Freeland & Co. v. Finlayson*, 11 June 1823, 2 Sh. 389, N. E. 344.

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a subscribed minute, which becomes binding upon its adoption by the grantee as the basis of a settlement. (*l*)

Rule of distribution where fund insufficient for payment of composition.

2174. Before distributing the funds placed in his hands for payment of a composition, the trustee ought to satisfy himself that it is sufficient; for, if otherwise, he must either be content to pay a dividend upon the stipulated composition, or he must distribute the fund unequally, thereby exposing himself to liability in a personal action. (*m*) In the event of a failure of the supplies before the distribution has been completed, it would seem that those creditors whose interests have suffered by the stoppage will not be entitled to an equalising dividend out of any future funds that may be recovered. (*n*) And if the creditors have granted an absolute discharge in anticipation of payment, they will only be entitled, on default in payment, to rank for the amount of the unpaid instalments. (*o*)

Deeds of arrangement in bankruptcy.

2175. The estates of sequestrated bankrupts may be wound up under a deed of arrangement or composition contract, without the debtor being subjected to the usual examination; but the machinery provided by the Act for winding up estates in this form is very imperfect, and a deed of arrangement is seldom resorted to in practice. (*p*)

(*l*) See *Glass v. Mackintosh*, 12 May 1825, 4 Sh. 1.

(*m*) *Aitken v. Graham*, *supra*.

(*n*) Bell's Com. 6th ed. 1184.

(*o*) See *Goodsir*, 2 Montague, 222, note; and *Peel*, 1 Rose, 435, cited in Shaw's Bell's Com. 1184.

(*p*) See 19 & 20 Vict., cap. 79; and 23 & 24 Vict., cap. 88, § 5.

CHAPTER LXVIII.

EXTINCTION OF THE TRUST AND DISCHARGE OF
THE TRUSTEE.

2176. It is equally the duty and the right of the trustee, after all the temporary purposes of the trust are fulfilled, to make a final distribution of the remaining estate, and to discharge himself of the burden of the trust by conveying or paying over the residue to the truster, if alive; or if otherwise, to his heirs, or the disponees of the equitable interest. As a general rule, a trustee cannot be compelled to denude of his office while there are trust purposes remaining unfulfilled. (a) His duty as protector of the settlement requires in most cases, and more especially if there are minor beneficiaries, that he should retain a certain control over the trust property,—a duty which is not discharged by simply investing the funds in the names of those who are beneficially interested in the succession.

Duty of distribution after fulfilment of trust purposes.

2177. Suppose, for instance, that the destination is to a plurality of persons with right of survivorship, or to parties successively substituted to the succession, it is clear that in such a case the trust must be kept up for the protection of the contingent interests. By investing the funds in the name of the institute, subject to the terms of the destination, the trustee would put it in the power of the institute to commit a breach of trust. The destination over would not prevent the latter from giving a good title to a purchaser. Again, if there are annuities or life interests charged upon the general succession, the trustee is entitled, and it will be his duty, unless the consent of the annuitants is obtained to a different arrangement, (b) to retain a capital sum in his hands yielding a sufficient return to meet the expense of the annual burdens, with a margin to cover depreciation or abatement of interest. Annuitants are not obliged to accept annuities purchased from an insurance company;

Trustee must take care to protect contingent interests.

(a) See, however, *Stainton v. Stainton's Trs.*, 25 Jan. 1850, 12 D. 572.

(b) *L'Amy v. Nicolson's Trs.*, 5 Dec. 1850, 18 D. 240; *Hume v. Stewart*, 26 Nov. 1834, 18 Sh. 90.

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for they are entitled to the security of a legal investment in the funds, or on heritable security.(c) However, trustees are not entitled to deprive the fiar of his enjoyment of the estate on the ground that it is subject to the burden of annuities; for the interest of the annuitant is sufficiently secured by setting apart a fund adequate to yield the required annual payment.(d)

Trustee is responsible for denuding in favour of the proper party.

2178. Again, it is incumbent on trustees to satisfy themselves, before denuding of the estate, that the parties to whom they make payment are entitled to it.(e) If, through any misapprehension on their part, the trust-funds are distributed in a manner not authorised by the provisions of the settlement, the loss will fall upon the trustees, unless the heirs of the settlement were aware of their rights and acquiesced in the distribution.(f) As trustees cannot be expected to incur any risk, they are entitled, and it is their duty in all cases of doubtful construction, to seek the authority of the Court for the proposed distribution, in an action of multiplepoinding and exoneration. A bond of indemnity may secure to the trustees their relief against the party to whom payment has been erroneously made, but it will not relieve them from liability to account, in the first instance, to the party truly entitled. Where an indemnity has not been asked, it is doubtful whether the trustees have any recourse against a party to whom payment of a gratuitous provision has been made in consequence of error in law. In the case of payment to a creditor in excess of the free funds, trustees have certainly no relief; for, as the whole debt was *ex hypothesi* due by the truster, there is no equity between the creditor and the truster's representatives entitling the latter to claim repetition.(g)

Effect of bond of indemnity.

Duty of trustees in cases of uncertainty as to whether a legatee is in life.

2179. A frequent source of uncertainty as to the parties who are beneficially entitled to a succession, is the disappearance or long-continued absence of legatees, giving rise to questions depending upon the presumption of life, either as at the period of distri-

(c) *Scheniman v. Willison's Trs.*, 3 July 1832, 10 Sh. 759; *Forsyth v. Kilgour*, 15 Dec. 1854, 17 D. 208; *Davidson v. Dobie*, 13 Feb. 1828, 6 Sh. 536. See *Burrell v. Delevante*, 31 L. J. Ch. 365, and cases there cited.

(d) *Watt v. Greenfield's Trs.*, 18 Feb. 1825, 3 Sh. 544.

(e) It is scarcely necessary to allude in this place to the hazard to which trustees may be exposed in consequence of their ignorance of the principles of the law of vesting. These principles are now beginning to be better understood; and we may even look forward to the advent of a time

when trustees of a settlement which provides for contingent interests may be enabled to wind up without seeking for judicial exoneration.

(f) The question of the trustees' liability is discussed in chapter 74, sect. 1. As to the effect of acquiescence, see chap. 76, *in fin.*

(g) *Cathcart v. Moodie*, 1804, M. "Heir and Executor," App. No. 2; *Ogilvie v. Boswell*, 12 D. 940; 15 July 1856, 19 D. Ap. Ca. 7; *Mackenzie v. Thomson*, 12 Nov. 1846, 9 D. 85; *Jeffrey v. Ure*, 21 June 1825, 1 W. & S. 565, reversing 2 Sh. 646, N. E. 545.

bution or at the death of the testator. *(h)* For our present purpose it is sufficient to observe, that if there be a doubt as to the time when the death of a beneficiary took place, the trustees ought not to pay without the protection of a decree of Court; unless, indeed, it is clear that the circumstances do not affect the descent of the beneficial interest. *(i)*

2180. Trustees ought to be careful, if they pay to a beneficiary indirectly, that the party by whom the money is actually received has authority to act for his principal; for in the event of their paying through an unauthorised channel, as, for example, to a judicial factor or curator who has not found caution, *(k)* or to an agent or mandatory whose commission has expired, *(l)* and the money being misappropriated or lost before reaching the principal, they may be compelled to pay over again. A trustee is entitled to pay to the father of a minor, in his character as administrator-in-law, though, if the circumstances of the father are such as to suggest doubt with regard to the safety of the money, he ought either to have the fund distributed under the authority of the Court, or to require security for its safe keeping. *(m)*

2181. Questions as to the power of the beneficiaries, in whose names trust-money is invested in terms of a direction, to uplift the sum in a bond and discharge the creditor, cannot be tried in the form of a multiplepinding, but may be competently raised in a suspension. The Court may, if necessary for the protection of contingent interests, require the debtors to enter into an obligation to reinvest the money, as a condition of granting authority to make the payment. *(n)* The liability of the trustee to replace funds which have been paid in error to a wrong party may be extinguished by prescription or taciturnity; and if the error be merely one of fact, not coupled with gross negligence, the plea of *bona fide* payment will be available to him. These defences are considered in a subsequent chapter. *(o)*

2182. It may be asked whether trustees are relieved from the

(h) See Chapter 3 (Opening of Succession), and the following cases:—*Barstow v. Cook*, 14 March 1862, 24 D. 790; *Chambers v. Chambers*, 14 July 1849, 11 D. 1359; *Stirling v Mackenzie*, 11 March 1847, 9 D. 923; *Garland v. Stewart*, 12 Nov. 1841, 4 D. 1.; *Campbell's Trs. v. Campbell*, 1 Feb. 1834, 12 Sh. 382; *Hyslop*, 15 June 1830, 8 Sh. 919; *Fettes v. Gordon*, 7 July 1825, 4 Sh. 149, N.E. 150; *Lord Ashburton v. Baillie*, 7 Feb. 1811, F.C.

(i) Where in such cases the Court thinks proper to decree a distribution of

the estate, the order is sometimes qualified with the condition of finding caution to repeat.

(k) *Donaldson v. Kennedy*, 18 June 1833, 11 Sh. 740.

(l) *Kennedy v. Kennedy*, 15 Nov. 1843, 6 D. 40.

(m) *Dumbreck v. Stevenson*, 11 Feb. 1861, 4 Macq. 86. See this point more fully noticed *infra*, chapter 76.

(n) *Moncrieff v. Bethune*, 1 June 1844, 6 D. 1100; 25 Feb. 1846, 8 D. 548.

(o) Chapter 76 (Actions).

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Questions as to authority to receive.

Sufficiency of discharge by beneficiary having a limited title.

Extinction of liability for erroneous payment.

Advice of counsel, whether a sufficient exoneration to trustees.

CHAP. LXVIII. consequences of having made an erroneous distribution of the estate by having acted upon the advice of counsel.(p) The only answer that can be given is, that erroneous advice is no excuse for acting contrary to law ; but that, in transactions depending upon matters of fact, or upon discretion, where the doctrine of *bona fides* affords a relevant defence, the fact that the course taken by the trustees was in accordance with the recommendation of an experienced legal adviser, would go far to support the defence founded upon that plea.(q) It is clear that the fact of having been erroneously advised by counsel is no justification to trustees for erroneously investing the trust-funds. This defence was expressly overruled in *Morrison v. Miller*,(r) where trustees were held liable in damages for refusing to invest in the funds on the requisition of the beneficiaries ; and in *Pollexfen v. Stewart*,(s) where the complaint was, that instead of purchasing lands as directed, the trustees had invested in the purchase of feu-duties.

Trustee is entitled to an unconditional discharge.

Elliott's Trs. v. Elliott.

2183. If a trust is wound-up out of Court, the trustees may require the legatees of the residuary interest to execute a discharge in their favour ; and such discharge must be unconditional, and ought to include an obligation to relieve the trustees from any contingent liabilities arising upon the settlement, which may be supposed to be outstanding. This is illustrated by the case of *Elliott's Trs. v. Elliott*,(t) where trustees, having been required to denude of the residuary estate in fulfilment of the ultimate purpose of the trust, they objected, that although the heir had offered to leave a certain sum in their hands to answer any contingent demands that might be made on them, and also to find security for any expenses they might incur in discussing objections to their accounts, *if they should be found entitled thereto*, the offer was qualified by a reserva-

(p) Trustees are of course entitled to the expense of consulting counsel on all doubtful matters, for they are entitled to such extrajudicial direction as can be obtained, at the expense of the estate ; although they are not justified in acting upon it, if erroneous, as it is their duty in doubtful cases to seek the direction of the Court ; *Shepherd v. Hutton's Trs.*, 24 Feb. 1854, 17 D. 516 ; see p. 528, *per* Lord Justice-Clerk Hope.

(q) In an English case, where an executor was induced to make an erroneous payment by a misconception as to the effect due to a foreign promissory-note which had been granted by the truster without consideration, Lord Alvanley said, that if the trustee had been advised by English

counsel to make the payment, he would not have held him liable ; for a testator could not be permitted to lay a trap for his executor by doing a foolish act which might mislead him ; *Bez v. Inray*, 5 Ves. 141. And in *Leslie v. Baillie* executors were held excusable for having made an erroneous payment from misconception as to the right of the beneficiaries under the law of Scotland, on the ground that they were not bound to know the law of a foreign country (2 Y. & C., Ch. Ca. 91).

(r) *Morrison v. Miller*, 9 Feb. 1827, 5 Sh. 322, N. E. 299.

(s) *Pollexfen v. Stewart*, 14 July 1841, 3 D. 1217.

(t) *Elliott's Trs. v. Elliott*, 3 July 1828, 6 Sh. 1058.

tion of all objections competent to the heir to their accounts and management. From a report obtained in the action, it appeared that the objections here referred to involved the responsibility of the trustees for transactions, the effect of which could not be determined without an inquiry into the facts. The Court were of opinion that they had no power to compel the trustees to denude, unless they could at the same time grant them a discharge, and therefore remitted to the Lord Ordinary to proceed with the accounting.

2184. The principle is further illustrated in *Edmond v. Dingwall's Trs.*,^(u) which was a case arising out of a trust of heritable property for economical management and payment of debts. The truster having brought an action of denuding, in which he stated a variety of objections to items of charge against the estate, and founded upon an extrajudicial offer to pay the balance claimed by the trustees, under reservation of the objections stated in his condescendence, the Lord Ordinary found specially, that all the objections stated to the accounts were either untenable, or had been departed from, and that, apart from the question of accounting, the trustees had stated no grounds for resisting the conclusions for denuding, decerned against the trustees, and found neither party entitled to expenses. But the Second Division of the Court, being of opinion that the trustees were entitled to retain the estate until they received a discharge in full, allowed them to take credit for the expense of resisting the action.

Edmond v. Dingwall's Trs.

2185. It has been expressly decided that the legatee of a specific sum is not bound to grant a formal discharge, and that a simple receipt upon a penny stamp is a sufficient acquittance to the trustee.^(x) The Court professed to reserve the question, whether a formal discharge could be demanded from a residuary legatee. But it can scarcely admit of serious doubt, that the donees of a residuary interest are bound, not only to acknowledge receipt of the money, but to discharge the trustee of his intromissions.

A receipt is a sufficient discharge in the case of a legacy.

2186. If the beneficiary refuses to grant, or is disqualified by reason of legal or conventional incapacity from granting, a valid extrajudicial discharge, the trustee is not bound to retain the property, or to wait for exoneration until an action of denuding is instituted against him. He may sue for his own discharge in an action of exoneration at the expense of the estate. For example, where a power was given to trustees of a family settlement to retain the share of any child to whom they might think it improper to intrust it, either on account of extravagance, dissipation, weakness,

Trustee entitled to judicial exoneration when he cannot obtain a discharge.

^(u) *Edmond v. Dingwall's Trs.*, 16 Nov. 1860, 23 D. 21.

^(x) *Fleming v. Brown*, 6 Feb. 1861, 23 D. 443.

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losses in trade, or other unforeseen circumstances; and the husband of one of the truster's daughters became insolvent, and was under trust, the Court, altering a judgment of Lord Meadowbank, allowed the trustee the expenses of obtaining a judgment on the question, whether he was bound to pay to the husband. (y) It is quite settled, that the objection of no double distress will not hold where the trustee is unable to obtain an extrajudicial discharge, whether the difficulty arise from unwillingness to settle on the part of the beneficiaries, or from the minority or non-residence of any of the parties. The plea that all the trustees do not concur, is equally irrelevant; because the object sought in an action of exoneration is the indemnity of the individual trustee. (z)

Trustee, whether entitled to oppose action of exoneration by co-trustee.

2187. A trustee is not justified in opposing an action of exoneration at the instance of his co-trustee, on the ground that the latter had taken no active part in the management of the trust, or that there is no apparent risk of liability; for although the trustee has not interfered actively, he may nevertheless have incurred liability. (a) "It is not necessary," said Lord Fullerton, in a case of this kind, (b) "that there should be actual competition; it is enough that there is a possibility of competition. I cannot see what interest the co-trustee had to oppose the action. It is said that it occasioned unnecessary expense. If the parties interested had been all paid, and were ready to grant discharges, what matter is it whether the discharges were given before or after the raising of the action? There was nothing but a formal action brought to make the raiser perfectly safe. The only expense has arisen from the opposition." (c)

Discharge of trustees resigning and heirs of trustees dying during the subsistence of the trust under the Trusts Act.

2188. By section 9 of the Trusts (Scotland) Act, 1867, (d) it is enacted that "when a trustee who resigns, or the representatives of a trustee who has died or resigned, cannot obtain a discharge of his acts and intromissions from the remaining trustees, and when the beneficiaries of the trust refuse, or are unable, from absence,

(y) *Neilson's Trs. v. Peacock*, 11 Dec. 1822, 2 Sh. 89, N. E. 80.

(z) See *Taylor v. Noble*, 24 May 1836, 14 Sh. 817, where both objections were repelled, first by Lord Corehouse, and afterwards by a unanimous judgment of the Court; *Cumming v. Hay*, *infra*; and *Blair's Trs. v. Blair*, 12 Dec. 1863, 2 Macph. 284.

(a) *Cumming v. Hay*, 28 Feb. 1884, 12 Sh. 508; *Dunbar's case*, *infra*.

(b) *Dunbar v. Sinclair*, 14 Nov. 1850, 13 D. 54.

(c) 13 D. 60. Where the same body of trustees held separate appointments under two distinct deeds of trust, they were found entitled to combine the affairs of both in the same process of exoneration; *Cumming v. Hay*, 28 Feb. 1884, 12 Sh. 508.

(d) 30 & 31 Vict., cap. 97. By section 2, trustees are empowered generally to grant discharges to trustees who have resigned, and to the representatives of trustees who have died. This seems to be nothing more than a declaration of the existing law.

incapacity, or otherwise, to grant a discharge, the Court may, on petition to that effect at the instance of such trustee or representative, and after such intimation and inquiry as may be thought necessary, grant such discharge, and it shall be in the power of the Court to direct that the expense of such application be paid out of the trust-estate, if the Court shall consider this reasonable.”

2189. If a beneficiary withdraws his instance from an action of denuding, or count and reckoning, raised in the joint names of himself and one of the trustees against another trustee, the pursuing trustee, who is thus deprived of the means of obtaining judicial exoneration in the original action, may bring a multiplepinding and exoneration in his own name, at the expense of the trust-estate, for the purpose of obtaining his discharge.^(e) Where an action of accounting was raised by beneficiaries, with concurrence of a trustee, against the other trustees, it was held that the representatives of the concurring trustee were not necessary parties to the suit; the argument on the other side being, that the defenders were entitled to have them sisted, in order that they might have better security for their expenses.^(f)

Trustee may sue for exoneration without consent of the beneficiaries.

2190. Where trustees are bound by the constitution of the trust to convey the estate to a different body of trustees, it is clear that the right of the original trustees to obtain their discharge from their successors, or, if necessary, judicial exoneration, must depend upon the same conditions which regulate the rights of trustees denuding in favour of the beneficiaries themselves. Thus, a judicial factor who has been allowed to retire, is entitled to exoneration before handing the estate over to his successor, and may claim the expenses of his discharge from the estate, in the event of an action of accounting being instituted against him.^(g) It may be observed, that in this case the interest of the retiring trustee, or body of trustees, to obtain exoneration from the Court is peculiarly strong; for although the purposes of the trust are supposed not to have been exhausted, and the trustee would not therefore be in a position to ask a discharge from the beneficiaries themselves, he must cede possession of the documents which instruct his administration and vouch his payments. And no discharge which the new administrators could grant, in their fiduciary capacity, would be available to the outgoing trustee, either as a personal obligation of indemnity, or as a bar to a subsequent action at the instance of beneficiaries who were not parties to it.

Exoneration of trustees denuding in favour of other trustees.

^(e) *Fotheringham v. Saltoun*, 31 Jan. 1852, 14 D. 427.

^(g) *Myles v. Ireland*, 6 Mar. 1855, 17 D. 591.

^(f) *Darling v. Adamson*, 20 Nov. 1841, 4 D. 48.

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On what grounds a discharge can be opened up.

Contrast as to implied discharge and homologation.

One creditor is not bound by a discharge executed by other creditors.

2191. After a trustee has been formally discharged, it is incompetent to open up his transactions, unless upon precise and relevant averments of actual fraud.^(h) Acts of constructive fraud, as, for example, purchases of the trust-property by the trustee, afford no sufficient ground for reopening accounts after a final settlement, as such transactions, being within the knowledge of the parties, are held to be condoned by the discharge.⁽ⁱ⁾ And even the implied discharge arising from long taciturnity, amounting to acquiescence, has been held sufficient to protect the trustee against an action of payment,^(k) or for breach of trust. But the law will not readily presume that a party has consented to injustice; and in order that tacit consent may be available as a protection, the party must have been *sui juris*,^(l) not ignorant of his rights,^(m) and fully aware of the true nature of the transaction.⁽ⁿ⁾

2192. A mere *non repugnantia* is not sufficient homologation.^(o) On the other hand, a letter authorising a trustee to proceed with a sale of trust-property to himself, and promising not to challenge it, will be binding on the writer.^(p) And where a bankrupt had been present at the sale of his estate, and had acted as attorney for the trustee when infestment was passed on his purchase, and concurred with the creditors in a petition for the exoneration and discharge of the trustees, the Court unanimously assoilzied the trustee from a reduction at the instance of the heir of the bankrupt.^(q) It may be mentioned that in this case the bankrupt had also taken a lease of part of the estate from the trustee, and lived on the estate for thirty-nine years before the challenge. Where the beneficiaries consist of a numerous class of persons, as, for example, the truster's creditors in bankruptcy, a discharge by the general body will not deprive the individual creditor of his right to reduce an illegal transaction, unless some act of acquiescence can be brought home to him.^(r)

^(h) *Campbell v. Montgomery*, 30 May 1822, 1 Sh. 446, N. E. 413; *Robertson v. Scott*, 8 July 1834, 12 Sh. 875; *Macpherson v. Macpherson*, 16 July 1841, 3 D. 1242; *Blyth v. Chisholm*, 2 Mar. 1838, 11 Sh. 512; *Kyle's Tr. v. Allan*, 28 Nov. 1882, 11 Sh. 87; and see *Hume v. Stewart*, 26 Nov. 1884, 13 Sh. 90.

⁽ⁱ⁾ *Innes v. Duke of Gordon*, 5 July 1822, 1 Sh. (Ap. Ca.) 169; *Thorburn v. Martin*, 8 July 1853, 15 D. 845; *Robertson v. Scott*, *supra*.

^(k) *Scott v. Mitchell*, 27 May 1830, 8 Sh. 820; *Stuart v. Maconochie*, 4 Feb. 1836, 14 Sh. 412.

^(l) *Irving v. Tait*, 3 June 1808, M.

"Deathbed," App. No. 6; *Brodie v. Brodie*, 6 July 1827, 5 Sh. 900, N. E. 835.

^(m) *Innes v. Duke of Gordon*, *supra*.

⁽ⁿ⁾ *Thorburn v. Martin*, *supra*.

^(o) *Taylor v. Watson*, 20 Jan. 1846, 8 D. 404.

^(p) *Duff v. Gorrie*, 23 May 1849, 11 D. 1054.

^(q) *Fraser v. Hankey*, 13 Jan. 1847, 9 D. 415. In an early case a back-bond of trust being found in the trustee's repositories was held to afford a presumption that the trust was discharged; *Charteris v. Charteris*, 1712, M. 11,413.

^(r) *Thorburn v. Martin*, 8 July 1853, 15 D. 845, *per* Lord Wood.

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2193. A discharge of trust intromissions, as it is a deed which the beneficiary is under obligation to grant, will not be extended so as to affect other interests than those to which it was intended to apply. For example, a discharge granted to trustees does not imply a renunciation of the granter's legal provisions in a question with other beneficiaries.^(s) Where several beneficiaries execute a joint discharge in favour of the trustee for their respective rights and interests, with a clause of absolute warrandice, they are not held to warrant the validity of the discharges by one another; for absolute warrandice in a discharge imports no more than an indemnity to the trustee by each party to the extent of the share of the funds which he has himself received.^(t)

Legatee discharging a trustee does not impliedly discharge his claims in a question with competing legatees.

2194. If trustees, directed by their deed of constitution to invest money on proper heritable security in favour of a married woman, excluding her husband's *jus mariti*, advance the money to the husband, the discharge of the wife, granted *stante matrimonio*, will not bar her right of action after she acquires a separate standing. For, in the first place, her consent to allow the money to be received by her husband is a *donatio inter virum et uxorem*, and revocable; and, in the next, it is clear that, as the trust has been created for the protection of the wife's separate interest, the trustees have a curatorial duty to discharge, and cannot, without a direct breach of trust, devolve the custody of the estate upon the husband.^(u)

Husband cannot discharge his wife's claims where *jus mariti* excluded.

How far wife's discharge is effectual.

2195. Although, as we have seen, any member of a body of trustees is entitled to institute proceedings in his own name for the purpose of obtaining *exoneration*, a sole resident trustee is not entitled to *wind up* the trust in the absence of his colleagues. In several instances, however, the Court of Session has granted authority to a resident trustee to wind up the trust alone, on the ground of the absence of the other trustees, and the inexpediency of appointing a factor.^(x) The cases have been noticed in a separate chapter.^(y)

Trustee cannot wind up without judicial authority in the absence of his co-trustees.

2196. Before a trustee can be required to denude, he is entitled to be indemnified for his expenditure on behalf of the trust, and to

Trustee entitled to be kept *indemnitis*.

(s) *Halbert v. Dickson*, 18 Feb. 1851, 13 D. 667.

(t) *Macfarlane v. Donaldson*, 12 May 1835, 18 Sh. 725. See Lord Mackenzie's remark, p. 734.

(u) *Mayne v. M'Keand*, 4 June 1835, 13 Sh. 870; *Ross v. Allan's Trs.*, 18 Nov. 1850, 18 D. 44. See Chapter 46 (Wife's Separate Estate).

(x) Pet. *Miller*, 19 Jan. 1854, 16 D. 358; Pet. *Fraser*, 1 March 1837, 15 Sh. 692; Pet. *Findlay*, 30 June 1855, 17 D. 1014; *Watson v. Crawcour*, 17 Feb. 1844, 6 D. 687; *Lauder v. Lauder's Trs.*, 12 Nov. 1851, decided 19 July 1851, 14 D. 14.

(y) Chapter 56, sect. 2 (Appointment of New Trustees).

CHAP. LXVIII. be relieved of obligations undertaken by him in his fiduciary character. To the effect of enforcing this right he has a lien on the trust-estate.(z) On the other hand, where sufficient security is offered that he will not be required to meet the obligations which he has undertaken on behalf of the trust, the trustee is bound to denude if desired by the beneficiaries.(a)

(z) 2 Bell's Com. 5th ed. 128, and cases there cited.

(a) *Henderson v. Norris*, 31 March 1866. 4 Macph. 691.

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ANTICIPATION OF THE PERIOD OF PAYMENT.

2197. Where the period of distribution of a trust-estate is postponed by the terms of the trust for the purpose of protecting contingent interests which may emerge in the interval, the trustees are not entitled, as a general rule, to anticipate the payment of the shares for the convenience of those who are apparently entitled to the succession. The interest of the contingent legatees creates an obligation on the trustees to retain the possession of the estate until the arrival of the appointed period of division. The residuary legatees first named may die before the period of distribution specified in the settlement; in which case the conditional institutes—or the survivor of those first instituted, if the destination be to survivors—acquire an absolute right to the succession, a right which the trustees are not entitled to disappoint by a premature conveyance to the institutes. In this class of cases, accordingly, the interest or profits of the estate must be accumulated and added to the capital; and even although the result should be that the final distribution of the estate is postponed for more than twenty-one years after the settlor's death, still, so long as the destination of the residuary interest remains uncertain, no benefit can accrue to the presumptive legatees; but the surplus revenues must be treated as undisposed-of succession, and paid to the truster's heirs-at-law. (a)

What is meant by anticipation.

2198. Questions relating to the anticipation of the period of division generally resolve into questions of vesting, the law of which has been already sufficiently discussed. (b) It is therefore unnecessary to enter upon a formal discussion of the authorities. It may, however, be convenient to classify the decisions according to the circumstances by which the prior interests are determined. When so considered, it will be seen that the competency of anticipating the period of division is resolved by the criterion of vesting, and does not depend upon the specialties connected with the cause of failure. Where-

Importance of the element of vesting in regard to such questions.

(a) *Lord v. Colvin*, 7 Dec. 1860, 28 D. 111.

(b) Chapters 42 and 48.

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ever the succession finally devolves to legatees in whom a right has vested, they seem to be entitled to immediate payment; where under the terms of the settlement the interest has not vested, anticipation would seem to be incompetent.

Classification of cases in which payment may be required, in anticipation of the appointed period.

2199. A legatee may become entitled to the enjoyment of a succession in anticipation of the period appointed by the settlement:—(1) Where the fee and the liferent come to vest in one and the same person by descent or purchase; (2) where by the terms of the settlement legatees *in esse* have a vested right to a fund, subject to diminution in the event of the birth of children in a certain family, and where, from the age of the mother, or other circumstances, it is to be presumed that the number of the family will not be increased; (3) where a legatee's interest is dependent upon the death of another person, and the circumstances are such as to overcome the presumption of life, although the death of the party previously instituted is not actually proved; (4) where, under a destination to one person in liferent and to another in fee, the liferenter discharges his right, or where all the parties interested, absolutely or contingently, agree to an immediate division; (5) where the distribution is postponed to a definite time, subject to a destination over, and the parties conditionally instituted have all failed, or where under a joint destination the interest has vested in the last surviving legatee.

Case of a fiar acquiring the liferent, or claiming the benefit of a discharge of that interest.

2200. (1) Among the leading cases upon anticipation in consequence of the discharge of a life interest, we may notice, first, the case of *Rainsford v. Maxwell*,^(c) where trustees were directed to pay the annual proceeds of a trust-estate to the testator's nephew during his life, or until he should succeed to a certain entailed estate, and on his death or succession, to make over the whole to the testator's niece. The nephew offered to concur with his sister, the fiar, in granting a discharge to the trustees; and in these circumstances the Court held that the trustees were bound to denude.

Whether the contingent interest of the legatee's children is sufficient to prevent anticipation.

2201. The case of *Pretty v. Newbigging*^(d) was attended with greater difficulty. In this case the testator's widow, who had a liferent of the estate, offered to renounce her interest in favour of her son, to whom a fee was given, with a destination over in favour of his children. The case was referred to the whole Court, who, by a majority, sustained the claim of the son to immediate payment. The grounds of the decision were various; but the principle upon which the judgment may best be supported is, that as the des-

^(c) *Rainsford v. Maxwell*, 6 Feb. 1852, 14 D. 450; see also *Paterson v. Paterson*, 26 Jan. 1849, 11 D. 441. ^(d) *Pretty v. Newbigging*, 1 March 1854, 16 D. 667.

tion over to the legatee's children was nothing more than what the law would have implied under the condition *si sine liberis decesserit*, the destination was presumably to be referred to the same period as that to which the implied condition is held to refer, namely, the death of the testator; and the interest was therefore vested. In *Foulis v. Foulis* (e) there was a life-interest limited to the widow, fee to her three sons with right of survivorship, and to their issue. Had the survivorship clause continued operative, the vesting of the fee must of course have remained in suspense; but as this right was evacuated by the death of two of the widow's three children, the circumstances of the case were narrowed to the same position as *Pretty v. Newbigging*; there being no contingent interest remaining except that of the surviving son's children *nascituri*. The fee was thus held to have vested in the surviving son, to whom accordingly the trustees were ordained to convey the estate upon the widow executing a renunciation of her liferent.

2202. On the other hand, in the previous case of *Ferrie v. Ferrie*, (f) where also the residue of the truster's estate was limited to a party and his lawful issue, subject to an annuity to the testator's widow, and the period of distribution was fixed by the testator at the death of the widow, the Court refused to allow that period to be anticipated, although the residuary legatee offered to pay all legacies, and to secure the annuity to the satisfaction of the Court and of the trustees. In this case the proposed anticipation was opposed by one of the residuary legatees' children, who desired to have the trust kept up for the protection of his contingent interest. As in this case the widow was not instituted to the liferent of the *entire* estate, it might fairly be presumed that, in postponing the period of division, the testator had also in view the contingent interest of the legatees' children,—a circumstance which distinguishes this case from the cases previously mentioned.

Where the interest of the legatee's children has been considered by the testator when directing postponement, payment cannot be anticipated

2203. Where a liferent interest limited by deed is rejected by the beneficiary, as in the case of a widow claiming her legal provisions in place of an annuity settled upon her, (g) or where an annuity is held to be satisfied by advances, (h) such renunciation is held to place the fund in the same situation as if the interest had lapsed by death; and therefore, if there are no contingent interests to be protected, the fiars are entitled to an immediate division.

Effect of a repudiation of the life-interests upon the fiar's rights.

2204. It is unnecessary to refer in detail to the cases which

Liferenter acquiring the fee entitled to demand an immediate payment.

(e) *Foulis v. Foulis*, 8 Feb. 1857, 19 D. 362.

(f) *Ferrie v. Ferrie*, 23 Feb. 1849, 11 D. 704.

(g) *Annandale v. Macniven*, 9 June 1847, 9 D. 1201. See chapter 7 (Exclusion of Legal Claims).

(h) *Hume v. Stewart*, 26 Nov. 1834, 13 Sh. 90.

CHAPTER LXIX. establish the proposition, that a liferenter who succeeds to the fee of the same subject, in virtue of a radical right, *(i)* or of the terms of the trust destination, *(k)* or as heir-at-law, *(l)* is entitled to demand a conveyance from the trustees. In conformity with this principle, it has been held, that where a fund is destined by a marriage-contract to the wife in liferent, and the children of the marriage in fee, whether with or without an ulterior destination to the wife herself and her heirs in fee—upon the death of the husband without issue, the wife becomes entitled to the fee absolutely, and may put an end to the trust. *(m)* On the other hand, where a liferent was given to a wife for her alimentary use, and she afterwards succeeded to the fee as conditional institute under the ulterior destination, it was decided that the trust must be kept up during the subsistence of the marriage for the better protection of the wife's alimentary interest. *(n)* But in such a case there can be no doubt that, if the widow survived, she would be entitled to payment of the capital.

Cases depending on possibility of future issue, or upon the presumption of life.

2205. (2) and (3) The anticipation of the distribution of a trust-estate, where the trust is only maintained for the protection of the interests of children *nascituri*, or for the interest of a party presumed but not proved to have died, has been already incidentally noticed in treating of the conditions of vesting; and it is unnecessary to recur to the subject. *(o)* In such cases, the Court have a discretion to impose upon the legatees to whom payment is appointed to be made the condition of finding caution to answer the claims that may arise, should the event disprove the supposition upon which the Court proceeded.

Payment may be anticipated by consent of all the parties who have either a vested or a contingent interest.

2206. (4) Our next proposition is, that where all the parties interested in the distribution of a trust-estate, whether as beneficiaries or conditional institutes, concur in desiring the trustees to denude under such conditions as may be agreed upon, the trustees are bound to be satisfied with their discharge, and have no right to retain the estate. The most simple case is that of liferenters and fiars requiring the trustees to convey to them for their respective interests. *(p)* Upon the authority of the cases relating to the sale

(i) *Martin v. Bannatyne*, *infra*.

(k) *Grant v. Dyer*, 8 Dec. 1813, 2 Dow, 78.

(l) *Nisbet v. Tod*, 15 Jan. 1848, 10 D. 361; *Maxwell v. Wylie*, 25 May 1837, 15 Sh. 1005.

(m) *Martin v. Bannatyne*, 8 March 1861, 23 D. 705. Part of the fund in question came from the husband, and part from the

wife's father, and the Court found the widow entitled to the whole sum.

(n) *Balderston v. Fulton*, 23 Jan. 1857, 19 D. 298.

(o) Chap. 42, sect. 2.

(p) See *Rutherford v. Turnbull*, 30 May 1821, 1 Sh. 37, N.E. 38; *Craigie v. Gordon*, 17 June 1837, 15 Sh. 1157, where the fact that the liferenter was a widow, deaf and

of heritable property, it may be laid down that trustees would not be bound to denude of a heritable succession on the joint requisition of the beneficiaries, if any of those parties were in minority.(q) The limitation of a period of conventional majority by settlement, does not deprive the beneficiaries of their right to act in relation to the succession on attaining legal majority; and accordingly, in a recent case, where children's provisions were made payable on their attaining the age of twenty-five, it was held that a transaction with the trustees, into which they had entered after the youngest had attained majority, could not be repudiated by the children.(r)

2207. It happens not unfrequently that funds are advanced by trustees to a family on the joint authority of all the legatees interested, without any distinct arrangement as to the mutual rights of the parties. If, in consequence of a transaction of this kind, a discharge is afterwards granted to the trustees by all the beneficiaries, this will not exclude the right of the individual beneficiary to an ultimate adjustment of accounts as between himself and the other members of the family, because the discharge in such a case is presumed to have been granted simply for the exoneration of the trustees.(s)

Joint discharge by beneficiaries to trustees does not affect beneficiaries interests *inter se*.

2208. Transactions between heirs are obviously not binding in a question with an individual beneficiary who has not been a party to the arrangement.(t) Thus, where the brothers and sisters of an insane person, during his lifetime, and before the passing of the Moveable Succession Act, entered into an arrangement for the division of his succession after his death according to the principle of representation, and under reservation of a power of distribution amongst their respective children; and one of the brothers settled his whole estates upon his eldest son, under burden of certain provisions in favour of his younger children, it was held that the

Contingent interests.

dumb, but *sui juris*, was held not to impose upon the trustees the duty of retaining the custody of the estate; *Robertson v. Davidson*, 24 Nov. 1846, 9 D. 152, where it was decided that the trustees were not bound by a direction to hold the estate during the liferent when the liferenter and fiar concurred in demanding an immediate conveyance. An example of a more complicated arrangement between beneficiaries, involving the admission to a share of the succession of one of a family who stood excluded under the settlement, will be found in the case of *Brown v. Campbell*, 16 March 1855, 17 D. 759. See also *M'Lachlan's Exrs. v. Scott*, 16 Jan.

1850, 12 D. 467; *Johnston v. Johnston*, 11 March 1857, 19 D. 706, and 8 Macq. 619, 681, where Lord Chancellor Campbell observed, that "a family settlement, when *bona fide* made, the law much favours."

(q) *Auld*, Petr., 5 Feb. 1856, 18 D. 487. But see *Hope*, 15 Jan. 1858, 20 D. 890.

(r) *Adam v. Adam*, 30 March 1861, 28 D. 859.

(s) *Halbert v. Dickson*, 13 Feb. 1851, 13 D. 667. See, as to questions of this nature between creditors, *M'Lachlan's Exrs. v. Scott*, 16 Jan. 1850, 12 D. 467.

(t) *Mitchell v. Macmichan*, 18 Jan. 1852, 14 D. 318.

CHAPTER LXIX. agreement was ineffectual in a question with these children, their father not having imposed any obligation upon them to give effect to the agreement; and the succession was held to be divisible according to the Statute.(u) The existence of contingent interests is, as we have already seen, an effectual bar to any arrangement amongst beneficiaries involving anticipation of the period of payment, unless the parties contingently interested concur in discharging the trustees.(x)

Acceleration of period of vesting by predecease of conditional institutes or co-legatees.

2209. (5) Where, under the terms of a settlement, the vesting of the reversionary interest is postponed to the period of distribution in consequence of a provision of survivorship, if all but one of the joint legatees die or renounce their interests prior to the period of distribution, the interest of the survivor vests absolutely; for, the contingent interest which was the cause of the suspension being removed, there is no longer any obstacle to the acquisition of a vested right.(y) Accordingly, where the right to a joint bequest, subject to a liferent, has vested in the last survivor, the trustees are bound, on receiving a discharge of the liferent interest, to convey the entire estate to the surviving fiar.(z)

(u) *Hunter's Trs. v. Hunter*, 1 June 1864, 2 Macph. 1125.

(x) *Campbell v. Campbell*, 8 Dec. 1852, 15 D. 173. Compare *Scott v. Scott*, 18 June 1847, 9 D. 1264, 7 Bell 148, with *Nisbet v. Macdougall*, 27 June 1809, F.C.

(y) *Foulis v. Foulis*, 8 Feb. 1857, 19 D. 362; *Maitland's Trs. v. M'Dermid*, 15 Mar. 1861, 23 D. 782. In *Cattanach v. Thom's Exrs.*, 2 July 1858, 20 D. 1206, the right to a joint bequest of residue was held to

have vested in the issue of the last survivor before the arrival of the period of distribution, in virtue of the condition *si sine liberis decesserit*. See also *Smith v. Leitch*, 2 June 1826, 4 Sh. 659, N. E. 666; *Mowbray v. Scougall*, 12 Sh. 910, 31 Aug. 1835 (nom. *Thomson v. Scougall*), 2 S. & M'L. 805; *Maxwell v. Wylie*, 25 May 1837, 15 Sh. 1005.

(z) *Foulis v. Foulis*, *supra*.

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APPOINTMENT OF JUDICIAL FACTORS UPON
TRUST-ESTATES.

2210. In order that the beneficial interest may not lapse in consequence of the failure of the trustees of a settlement, the Court of Session has been in use to appoint judicial factors upon trust-estates in circumstances where such appointments were necessary, either for the protection of the ultimate interests of the beneficiaries, or with a view to immediate management. As such appointments are made *ex nobili officio*, the Court is not bound by any positive rules having relation to the convenience or expediency of interfering. There are, however, certain situations in which the appointment of a factor is a matter of obvious expediency, and where the appointment will be granted almost as a matter of course. The circumstances to which we refer are these:—*First*, where the office of trustee has lapsed, and the title to the beneficial or equitable interest still stands upon the trust-conveyance; *secondly*, where the trustee is insolvent, or has so conducted himself in relation to the trust affairs or otherwise as to be deemed untrustworthy; *thirdly*, where a quorum of trustees cannot be obtained, as may happen in the case of the incapacity, illness, or non-residence of one or more of the original accepting trustees; *fourthly*, in the event of the trustees differing in opinion with reference to the general course of management, or to transactions of special importance.

Origin and limits of the power of appointment vested in the Court of Session.

2211. (1) The earliest examples of the interposition of the Court in matters of trust-administration, were appointments in cases where there was a total failure of trustees. No doubt seems ever to have been entertained as to the jurisdiction and power of the Court to make such appointments; but in some cases it seems to have been contended that the beneficial interest was a mere burden upon the estate of the trustee, and fell with it as a necessary consequence of the failure in the trust-destination. (a) The argument, however,

Court will appoint a factor in cases of failure of the original trustees.

(a) See *Dick v. Ferguson*, 1758, M. 7446; *King's College of Aberdeen*, 1741, Elch. "Trust."

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was not successful. The distinction between the legal and equitable estates under trust-settlements was recognised by the Court in the last century, and the doctrine was laid down, that a lapse of the one estate did not involve the destruction of the other. It was virtually settled by the decisions referred to, and by the case of *Campbell v. Campbell*,^(b) that unless the right of succession was made dependent upon the trusteeship—e.g., in cases where a power of appointment was given to the trustee—the rights of the beneficiary could not be affected by his death or non-acceptance. This view was confirmed by two decisions which followed soon after,^(c) establishing a form of action, declaratory adjudication, whereby a beneficiary might obtain himself vest in the equitable interest notwithstanding the failure of the trustees of the settlement. The theory of the law in relation to equitable titles, as well as the course of practice, show that the appointment of judicial factors upon trust-estates is properly an act of administrative jurisdiction. Such appointments are not necessary to complete or fortify the title to the equitable estate. Their purpose is that of supplying a vacancy in the office of trustee, and providing for the economical administration of the estate under the supervision of the Supreme Court.^(d)

Court will not interfere where there is a subsisting and operative power of assumption.

2212. It has been laid down, that where the trust-deed makes provision for the assumption or nomination of trustees, the Court will not interfere, unless it can be shown that those provisions are inapplicable to the emergency which has arisen.^(e) As trustees are now, in virtue of the enabling clauses of the Trustee Act^(f) 1861, empowered to resign at pleasure, and also to supply vacancies in the trust by the assumption of new trustees, it might be supposed that in future there would be little need for requiring the assistance of the Court for that purpose. But the fact is, that by far the larger number of applications are those which occur in consequence of the total failure of the trustees, when there is, of course, no person *in titulo* to exercise powers of assumption. Where a widow, who had accepted and acted as trustee on her husband's estate, died intestate, and a judicial factor was appointed to administer her estate, the Court appointed the same party factor on

Double trusts.

No. 11, and Notes, "Jurisdiction," No. 21; *King's College v. Ramsay*, 1741, Elch. "Jurisdiction," No. 21; *Campbell v. Monzie*, 1752, M. 7440; *Macdowall v. Macdowall*, 1789, M. 7453.

^(b) *Campbell v. Campbell*, 1788, M. 4076, 6849.

^(c) *Drummond v. Mackenzie*, 1758, M. 16,206; *Dalziel v. Dalziel*, 1756, M. 16,204.

^(d) Accordingly, the Court will not

confer special powers upon the factor at his appointment, even though the destination should be to a factor to be nominated by the Court, on failure of the original trustee; *Harper*, 7 Feb. 1833, 11 Sh. 365.

^(e) See *Hamilton v. Littlejohn*, 7 W. & S. 380, and 8 July 1834, 2 S. & M.L. 355.

^(f) 24 & 25 Vict., cap. 84; see also 26 & 27 Vict., cap. 115.

the trust-estate of the husband, being of opinion that there was no necessity for a double management. *(g)* CHAPTER LXX.

2213. As the beneficiary's right to have a factor appointed results from the fact that the trust appointment has lapsed, it is clear that, in a question as to the competency or propriety of the proposed appointment, the manner in which the lapse has resulted is of no materiality. We shall merely mention some of the more ordinary varieties of circumstance under which such applications have been granted. For example, the office of trustee may lapse where all the parties named have predeceased the testator, *(h)* or where those who survive either fail to accept the trust *(i)* or refuse to exercise their office. *(k)* Again, it may happen that, although a quorum of the trustees have actually accepted, the trust may be prematurely brought to an end, either by the death of all the trustees without any new appointment having been made, *(l)* or by the exercise of a power of resignation, *(m)*—though it may be doubted whether trustees can relieve themselves from responsibility by resigning without having previously made provision for the continuance of the trust by the assumption of successors. *(n)* In the class of cases we have referred to, the appointment of a factor is usually made as a matter of course. It has sometimes been pleaded as a defence to applications under such circumstances, that the trust purposes have been fulfilled. This is a good defence, if well founded in fact; for clearly the Court would not commit the solecism of appointing a factor on an estate which had ceased to exist. *(o)* But if there is any estate, and any person claiming an interest in it, although merely reversionary and prospective, *(p)* or subsidiary, *e.g.*, as in the case of a creditor seeking to secure his debt, *(q)* a factor will, as a rule, be appointed. A party who has been nomi-

Examples of appointments in consequence of a lapse in the administration of testamentary trusts.

Defence that estate exhausted and trust wound up.

(g) *Clark v. Barstow*, 17 June 1856, 18 D. 1041. But see *Halcomb*, 9 July 1853, 15 D. 861.

(h) *Cairns*, 19 Jan. 1838, 16 Sh. 335.

(i) *Smart*, 29 June 1854, 16 D. 1004.

(k) *Drummond v. Lindsay*, 13 June 1857, 19 D. 859; *Russell*, 27 June 1855, 17 D. 1005.

(l) See *Thomson*, 10 July 1857, 19 D. 964; *British Linen Co.*, 20 July 1844, 16 Jur. 603; *Douglas*, 14 Dec. 1839, 2 D. 238. As to the effect of a partial failure in appointments of trustees for charitable uses, see *Wylie*, 28 June 1850, 12 D. 1110; *Ferguson v. Marjoribanks*, 1 April 1853, 15 D. 637.

(m) *Broughton's case*, cited in *Mackenzie v. Grieve*, 20 Dec. 1828, 7 Sh. 223.

(n) Per Lord Brougham in *Miller v. Black's Trs.*, 2 S. & M'L. 890.

(o) The Court is chary of appointing a factor where the apparent object of the application is to gain an advantage over a competing claimant; *Cunninghame*, Petr., 15 Jan. 1839, 1 D. 362; *Marshall*, Petr., 5 Jan. 1859, 21 D. 203.

(p) *Burnett*, 24 Jan. 1829, 7 Sh. 814; *Brown v. Robertson*, 29 May 1845, 7 D. 745.

(q) *Shaw v. Steele*, 28 Feb. 1852, 24 Jur. 266, 11 March 1852, 14 D. 762; *Hawarden v. Dunlop*, 31 May 1861, 28 D. 928.

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nated trustee, and who declines, will not be appointed judicial factor on the estate. (r)

Trusts *inter vivos*: whether truster has a reserved power of appointment.

2214. The limits within which the Court will exercise the power of appointing judicial factors upon estates created by trusts *inter vivos*, are not very well defined. On the one hand, the Court considers itself bound by the maxim that its powers are only to be exercised in cases of necessity,—that is, where there is no legal custodier of the trust property, and no power of reappointment vested in the parties interested. (s) In what circumstances a power of reappointment may be given by implication has never been definitely settled. It has generally been considered that, as regards private trusts for behoof of creditors, no power of appointment remains in the truster unless expressly reserved to him, and that the creditors have not the power of electing a new trustee unless it is conferred upon them by express grant. In such cases, accordingly, the authority of the Court may be sought with a view to the appointment or election of a new trustee. (t) Still, as the radical title to property disposed in trust for behoof of creditors belongs unquestionably to the truster, we incline to think that a power of appointing a new trustee to supply a vacancy must be held to remain with him as an adjunct to the property title. It is settled that a truster may at any time put an end to a trust for creditors by a recall of his mandate, accompanied by a tender of payment of the outstanding debts which the trust was intended to secure; (u) and the power of recalling the trust seems to include, by necessary implication, the power of making provision for its continuance.

Trusts for creditors.

Reserved powers of appointment in marriage-contract trusts.

2215. The grounds on which it was laid down that the parties to marriage-contract trusts had the power of appointing new trustees, are not so apparent. In such cases, no radical right or title remains in the disponent. The purpose of the trust-conveyance is the securing of the fund for the future wants of the truster's family,—a purpose which might be defeated in some instances, if the parties were at liberty to transfer the property to the custody of a trustee of their own selection. At the same time, it must be observed that in one class of marriage-contract trusts—we refer to trust-conveyances of the wife's property made in contemplation of marriage—the lady retains the radical title, together with a post-

Distinction in the case of trusts limited to the endurance of the marriage.

(r) *Pennycook*, 20 Dec. 1851, 14 D. 311.

(s) In *Montignani*, Petr., 17 Feb. 1866, 4 Macph. 461, where a bond destined to a married woman and her children, was to be paid up by the debtor, the Court appointed a judicial factor in order that the security might be discharged. and the

money reinvested with the same destination.

(t) See Pet. *Mitchell*, 28 Jan. 1860, 22 D. 632; *Earl of Lauderdale v. Earl of Fife*, 9 March 1830, 8 Sh. 675; *Morison*, 18 Jan. 1834, 12 Sh. 307.

(u) See Chapter 45 (Radical Right).

poned interest contingent on the dissolution of the marriage by the death of the husband without issue;(x) and it is at least an open question, whether the husband has not a reversionary interest in property conveyed by him under similar circumstances. This reversionary right in the settlor of estate conveyed for the uses of a marriage-contract trust, may be sufficient to give the party an interest to appoint new trustees; and upon this ground, the cases of *Lindsay* and *Tovey*(y) are more easily reconcileable with the principles of the law of property than has been supposed.(z) Upon this branch of the subject it is only necessary to add, that as the power of reappointment in such cases is not very clear, the Court will not insist on its being exercised, but will appoint a factor if the parties desire it.(a)

2216. Before leaving the subject of lapsed trusts, we must add, that where an estate disposed of by trust-settlement has been taken up as intestate succession by the legal representatives of the truster, and possession has followed upon their title, the Court will not appoint a factor, but will leave the beneficiaries to substantiate their claims by an action against the heir in possession.(b) The reason is obvious. The appointment of a factor, like sequestration of heritable estate, is a remedy properly applicable to cases where there is either no party in possession, or where the possession is recent and disputed. If, therefore, the legal representatives have been allowed to enter into possession upon the title of service or confirmation, the Court does not disturb that possession by summary process. But where an application is presented immediately on the completion of a title by the heir-at-law,(c) or personal representatives,(d) and for the purpose of preventing the legal representative from taking possession, a factor may be appointed.

Factor will not be appointed where competing claimants are in possession on a legal title.

2217. (2) It has never been laid down as a general rule, that the

(x) *Torry Anderson v Buchanan*, 2 June 1837, 15 Sh. 1073; *Cunningham v M'Leod*, 18 August 1846, 5 Bell, 210, affirming 3 D. 1288; *Martin v. Bannatyne*, 8 March 1861, 23 D. 705.

(y) *Lindsay v. Lindsay*, 19 June 1847, 9 D. 1297; *Tovey v. Tennant*, 11 March 1854, 16 D. 866.

(z) See Thoms, Jud. Fact. 28.

(a) *Davidson*, 18 June 1857, 19 D. 862; *Macgeorge*, 8 March 1856, 18 D. 792; *Allcock*, 2 June 1855, 17 D. 785. The Court has even appointed a factor where the contract itself was not a trust-conveyance—*Melville*, 8 March 1856, 18 D. 788—a case on which we should hardly be disposed to rely as a precedent.

(b) *Finlay v. Dymock*, 11 March 1854, 16 D. 868. In one case, the Court refused to appoint a factor on the ground that the appointment would interfere with the powers of creditors secured upon the estate; *Cunninghame v. Dickson*, 15 Jan. 1839, 1 D. 862. In another case, the appointment was refused because the object of the petitioners was to have the trust defended at the expense of the estate; *Marshall v. Graham*, 5 Jan. 1859, 21 D. 208.

(c) *Fraser v. Thorburn*, 15 Dec. 1855, 18 D. 264; *Brown v. Robertson*, 29 May 1845, 7 D. 745.

(d) *Barwick*, 27 Jan. 1855, 17 D. 308.

Insolvent trustee may be superseded by the appointment of a judicial factor.

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insolvency of a trustee is an absolute disqualification. The practice, however, is to accede to any reasonable application for the appointment of a factor on the ground of insolvency or embarrassment of the trustee, especially if the insolvent is a sole trustee, or one whose vote is necessary to make a quorum.(e) And this is just, because, even where the trustee's conduct has been unexceptionable, and his insolvency the result of innocent misfortune, it cannot be said that the trust-estate is safe in his keeping. Money paid, or goods delivered to him on behalf of the trust, might be poinded in his hands for his own debts; and mistakes in regard to the terms of a deposit, or investment of the proceeds of trust-property, might have the effect of bringing the trust-funds under the power of the trustee's creditors. In some cases the objection of insolvency has been obviated by the trustee finding caution; but we doubt whether such precedents would now be followed.(f) Trustees may therefore be advised that they are entitled to decline to act with a colleague who has become insolvent; and that, in the event of his insisting on exercising his rights as a trustee, they are entitled to apply to the Court to have the trust superseded.

Supercession of the trustee on the ground of misconduct.

2218. Any impropriety of conduct on the part of a trustee in relation to the administration, may be made a ground for an application to the Court for the sequestration of the estate and appointment of a factor.(g) Such applications have been granted, for example, in cases where the trustee has illegally attempted to purchase the trust-estate;(h) has retained considerable sums belonging to the trust in his own hands, or invested in his own name;(i) has attempted to sell out stock when the money was not required for the purposes of the trust;(k) or has otherwise placed himself in a position of antagonism towards the trust.(l)

Appointment of factor in consequence of the illness or non-residence of accepting trustees.

2219. (3) Where, in consequence of the non-residence, permanent illness, or incapacity of any of the trustees, an acting quorum cannot be brought together, the Court is always disposed to accede to an application for the appointment of a judicial factor.(m) Where

(e) *Towart*, 14 May 1828, 2 Sh. 305, N.E. 268; *Smith*, 15 May 1832, 10 Sh. 581; *Walker*, 30 May 1837, 9 Jurist, 480; *Soutar's Crs.*, 25 Nov. 1852, 15 D. 89.

(f) See *Barry v. Thorburn*, 11 March 1847, 9 D. 917; *Macpherson*, 19 Dec. 1840, 8 D. 315.

(g) Petitions for the removal of trustees must be presented in the Inner House; *Mitchell*, Petr., 20 July 1864, 2 Macph. 1878.

(h) The purchase of the estate of a bankrupt by his trustee is a sufficient rea-

son for removing the trustee from his office; *Brown v. Burt*, 23 Dec. 1848, 11 D. 338; *Drew v. Paterson*, 2 Dec. 1825, 4 Sh. 259.

(i) *Morris*, 27 Feb. 1858, 20 D. 716; *Fraser*, 11 March 1854, 16 D. 867; *Fleming v. Craig*, 30 May 1863, 1 Macph. 850.

(k) *Goold*, 19 July 1856, 18 D. 1318.

(l) *Thomson v. Dalrymple*, 11 Jan. 1865, 8 Macph. 336.

(m) *Nisbet v. Fraser*, 31 Jan. 1835, 18 Sh. 384; *Dean*, 17 Nov. 1852, 15 D. 17; *Stott*, 11 March 1854, 16 D. 867; *Watt*, 13

the temporary purposes of the trust have been fulfilled, and nothing remained to be done but to wind up or distribute the proceeds of the trust-estate, the Court has granted authority to the resident acting trustees, although less than a quorum, for that purpose.⁽ⁿ⁾ The doubts which were entertained in the profession as to the retrospective operation of the Trustee Act, seem to have been so far shared in by the judges of the Court of Session, that in a reported case which arose subsequent to the passing of the Act, authority to resign was granted to a non-resident trustee of a trust which had been in operation before the passing of the Statute.^(o)

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Resignation of trustees.

2220. (4) Although, as a general rule, trustees are bound to submit to the opinion of the majority, there are circumstances in which differences of opinion may prevail to such an extent that the administration of the trust is suspended, and where, therefore, a resort to judicial management becomes a matter of obvious expediency. In such cases the Court exercises a large discretion, and decides, upon a review of the whole circumstances, whether it is most expedient that the trust-management should be continued, or that the trustees should be relieved from a position which they have shown themselves incompetent to sustain.^(p) In effect, the Court is now relieved, in a great measure, from the responsibility of deciding upon such matters by the Act of 1861,^(q) enabling trustees to resign without special powers. The professional adviser can have no hesitation in recommending trustees to avail themselves of the privilege of resigning accorded by that statute where irreconcilable differences exist; and if this course is followed, an application at the instance of the beneficiaries for the appointment of a factor upon the trust-estate, will be granted as a matter of course.

Court will appoint a factor, where trustees cannot concur in the management.

2221. When trustees have lost the confidence of the beneficiaries,

Appointment of factor in respect of differences between the trustees and the parties beneficially interested.

June 1854, 16 D. 941. See the recent cases of *Smith*, 20 March 1862, 24 D. 888, where the First Division refused to remove an absent trustee, but appointed a judicial factor; and *Shand*, 20 March 1862, 24 D. 829, where the same Court first allowed the absent trustee to resign, and, on the resignation being lodged, appointed a judicial factor with the usual powers. In the case of *Hill*, 11 July 1855, 17 D. 1104, the Second Division refused to appoint a judicial factor, on the application of a trustee resident in England, and who alleged that he was unable, in consequence of non-residence, to fulfil the duties of the trust in person.

⁽ⁿ⁾ See the cases commented on in chapter 56, section 2. In one case, where the trustee on a sequestrated estate had become insane, the Court allowed a report by the commissioners to be received; *Guthrie*, 21 May 1845, 7 D. 687.

^(o) *Shand v. Mac Donald*, 20 March 1862, 24 D. 829.

^(p) *Forbes*, 14 Feb. 1852, 14 D. 498; *Adie v. Mitchell*, 19 Dec. 1885, 14 Sh. 185; *Laird v. Miln*, 7 Dec. 1888, 12 Sh. 187; *Home v. Hunter*, 7 March 1888, 11 Sh. 588.

^(q) 24 & 25 Vict., cap. 84; 26 & 27 Vict., cap. 115.

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or where there are dissensions betwixt them on matters of essential importance, it is often the best course for all parties that the trustees should retire, or that a joint application should be presented for the appointment of a factor; in which case, if both parties concur in requesting that the estate should be placed under judicial management, the application will be granted.^(r) Again, if there be a doubt as to the title of the trustee, the Court will be disposed to accede to an application for the appointment of an interim factor until the question of the trustee's right is tried.^(s) But the mere fact that the management of the trustees has not been satisfactory to those beneficially interested, or that it has been unfortunate in its results, is not *per se* a sufficient ground for superseding the trustees to whom a testator has committed the management of his property; for the very fact of the creation of a trust implies an indisposition on *his* part to rely exclusively on the judgment and discretion of those for whose benefit the trust has been created. When a trust-estate has passed into the hands of assumed trustees, the Court will more readily entertain an application for a transference of the estate into the custody of a judicial manager, as in this case the element of *dilectus personæ* is wanting.^(t)

Expenses of application for the appointment of factors.

2222. The expenses connected with the appointment of factors upon trust-estates form a preferable charge upon the estate; and after the factory has come into operation, which it does as soon as the factor has found caution,^(u) the factor has the same right of retention for his expenses which the trustee has in virtue of the primary purpose of the trust-disposition.^(x)

Administration of trust-estates by judicial factors, and their powers and duties.

2223. The administration of trust-estates by judicial factors is regulated by the Acts of Sederunt of 31 July 1690, 25 December 1708, 31 July 1717, and 13 February 1730. Where trustees are also *ex officio* tutors or curators to their constituents, and it becomes necessary to vest the estate *in manibus curiæ*, it is usual to apply for the appointment of a factor having the powers of a guardian, in which case the factory will fall under the jurisdiction created by the Pupils Protection Act.^(y) The subject of the duties and powers of judicial factors is an extensive one. Any summary we could give of the various enactments and provisions of consuetudinary law upon this subject would be incomplete and therefore valueless, unless accompanied by an analysis of the decided cases,—which

(r) *Taylor v. Taylor's Trs.*, 18 July 1857, 19 D. 1097; 14 Nov. 1857, 20 D. 52. 740; *Fullarton*, 11 July 1833, 11 Sh. 962; *Macfarlane v. Donaldson*, 12 May 1835, 13

(s) *Christy v. Paul*, 10 July 1834, 12 Sh. 916. Sh. 725.

(x) See this subject treated in chapter 75.

(t) *Christy v. Paul*, *supra*.

(y) 12 & 13 Vict., c. 51; see *Morison*,

(u) *Donaldson*, 18 June 1833, 11 Sh. Petr., 21 Feb. 1857, 19 D. 504.

are very numerous, and are besides too closely identified with the guardianship cases to admit of separate discussion. This would open up a much wider field of investigation than we are disposed to enter upon at the conclusion of a subject which is in itself very comprehensive, and has already led us considerably beyond the limits which we had originally laid down. There is the less reason for entering in this place upon the duties and powers of judicial factors and curators, as the subject has been separately treated in a work already in the hands of the profession. (z)

2224. By the 74th section of the Bankruptcy Act, the Lord Ordinary has power to remove any trustee on a sequestrated estate, upon the application of one-fourth in value of the creditors. (a) The Court has also jurisdiction to remove trustees when danger is to be apprehended from their continuance in office, but this power is not often exercised, and only in cases of *culpa* implying something more than error of judgment on the part of the offending trustee. (b) The appointment of a factor is the more usual remedy, sometimes combined with sequestration of the trust-estate. (c) Sequestration of the estate, although a stronger measure than the mere appointment of a factor, does not carry with it that direct censure of the conduct of the trustee which is necessarily implied in a sentence of deprivation of office. The chief distinction between removal and sequestration is, that in the latter case the powers of the trustee are merely suspended, and may be revived by a recall of the sequestration; while in the case of a removal, the appointment is abrogated, and the trustee is *functus officii*. The effect of the distinction is seen in a recent case, where application was made to the Court for the recall of the sequestration of a trust-estate which had been granted in consequence of the refusal of a sole trustee, who was insolvent, to assume new trustees. The trustee having subsequently executed a deed of assumption in favour of two trustees approved by the beneficiaries, the Court recalled the sequestration, holding that the deed of appointment would then come into operation. (d)

Removal of trustees, and sequestration of the trust-estate.

(z) We refer to Thoms on Judicial Factory, and more especially to the third chapter, p. 154 *et seq.*

(a) See *Baillie v. Anderson*, 18 July 1844, 6 D. 1376; *Lowden*, 31 Jan. 1835, 18 Sh. 389; *Cabbell v. Miller*, 8 July 1828, 6 Sh. 1101.

(b) See the cases of *Smith*, 20 March 1862, 24 D. 838; *Hay*, 19 Feb. 1861, 28 D. 594; *Butchart v. Butchart*, 1 July 1851, 13 D. 1258, and authorities there cited.

(c) *Hawarden*, 31 May 1861, 23 D. 923; *Morris v. Bain*, 27 Feb. 1858, 20 D. 716; *Barry v. Thorburn*, 11 March 1847, 9 D. 917; *Macpherson*, 19 Dec. 1840, 8 D. 315; *Home v. Hunter*, 7 March 1838, 11 Sh. 538; *Hamilton v. Littlejohn*, 18 March 1836, 2 S. & M'L. 355.

(d) *Shedden*, Petr., 27 June 1867, 5 Macpb. 955.

PART X.

LIABILITIES OF TRUSTEES AND EXECUTORS.

CHAPTER LXXI.

OF PASSIVE REPRESENTATION, OR THE LIABILITIES OF HEIRS.(a)

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| <p>I. <i>Passive Representation of Heirs, Executors, and Legatees.</i></p> <p>II. ——— of Apparent Heir three years in possession.</p> | | <p>III. <i>Preference of the Ancestor's Creditors.</i></p> <p>IV. <i>Irregular Passive Titles.</i></p> <p>V. <i>Discussion of Heirs and Right of Relief.</i></p> |
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Principle of the doctrine of passive representation.

2225. It is a principle of general jurisprudence that the estate of a person deceased continues to be liable for his debts and obligations after it has passed into the hands of his legal representatives. The application of this principle constitutes what is known in the law of Scotland as the doctrine of Passive Representation. The theory of our law is, that the heir represents the ancestor passively, and incurs an absolute liability (b) to fulfil his obligations, unless advantage is taken of the means provided by law for limiting that

(a) The subject of the passive liability of Heirs of Provision, Executors, and Legatees, though depending on different principles from that of heirs-at-law, is placed in this chapter, to avoid the inconvenience of separating the discussion of subjects so closely allied.

(b) To this peculiarity of our law, Professor Bell (1 Com. 5th ed. 695) attributes the non-recognition of the maxim, *Mortuus*

sasit vivum. No man can, in reason, be made personally liable for the debts of another, except by his own consent. Hence the necessity of such formal acts for connecting the heir with the ancestor, as service and confirmation, from which, as being purely voluntary proceedings, the heir is at liberty to abstain, if he wishes to avoid liability.

liability to the value of the inheritance. If the testator has expressly
 heir or personal representative may also be liable for the same
 declining to make it a part of the estate. If the testator has
 the estate, in which case the executor or administrator is
 against the estate itself by the executor or administrator
 tem and by confirmation of the executor or administrator.

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PASSIVE REPRESENTATION OF THE ELEMENTS OF A

[illegible]

2227. I. LIABILITY OF ESTATE AT LAW — Whether the estate at-law, whether of real or personal property, is liable for a title of universal succession and whether the estate derived from the title is liable for the same.

(c) The diligence of confirmation is required of the creditor. If the creditors-nominate have agreed in writing and in the action of confirmation which is the foundation of that agreement is sufficient to call the matter in question in terms of the Act 1945, cap. 4. See *Trusts v. Grant*, 21 June 1942 14 T.L.R. 100. Where the confirmation of the creditors-nominate does not exhaust the matter, the creditors may attack the confirmation *ad omnes*; *Attorney-General v. Lord*, 1808, M. & S. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 8

(d) *Ersk.* 3, 9. 48; *Bell & Fern* 3; 1846
Kirkpatrick v. Irvine, 17 Feb. 1849, 21 Feb.
608; 23 Sept. 1841, 2 *Rob.* 473.

(c) *British Linen Co. v. Lord Elphinstone*,
May 1850, 12 D. 949. It is not enough to
sue an executor for debts heritably acquired.

CHAPTER LXXI.

Secus, as to special service or entry by precept.

Joint representation of heirs-portioners.

Whether the title of heir-male is a universal passive title.

Service cum beneficio inventarii, and service with specification annexed.

obligations of the ancestor.(i) By the ancient law, a special service as heir-at-law was held to import a general service in the same character, and to render the heir universally responsible; but by the Service of Heirs Act(k) special services are put on the same footing as entries by *clare constat*, and the person served as heir is declared to be "liable for the deceased's debts and deeds only to the extent or value of the lands and other heritages embraced by such special service and no farther." An entry by precept or writ of *clare constat* infers passive representation only *in valorem* of the subject,(l) and entry *more burgi* is subject to the same limitation.(m)

2228. Heirs-portioners are liable for their rateable shares only in the first instance;(n) but if any of them are insolvent, the co-heirs are liable for the deficiency to the extent of the value of their respective interests in the succession.(o)

2229. It is laid down by Erskine that a general service as heir-male infers universal passive liability, and the *dictum* is repeated by Bell;(p) but the reason assigned by Erskine—viz., that such a service carries right to all subjects destined to heirs-male—proceeds on the supposition that heirs of provision, not *alioqui successurus*, are universally liable; a supposition which Bell has in the same passage shown to be erroneous. There can be no heir-male, except of provision.(q)

2230. By an Act of the Scottish Parliament, based on the principle of the civil law, heirs were enabled to enter *cum beneficio inventarii*.(r) Upon complying with the requirements of the Statute, which were directed to the object of ascertaining the extent of the succession, the heir's responsibility was declared to be limited to the value of the heritage given up in the inventory.(s) Service

(i) Ersk. 8, 8, 50; 1 Bell's Com., 5th ed., 659; Pr. § 1916. There is no liability unless the service gives right to estate; *Aytoun v. Aytoun*, 1784, M. 9732; *Earl of Fife v. Duff*, 7 March 1828, 6 Sh. 698; *M'Kay v. Campbell's Trs.*, 13 Jan. 1885, 13 Sh. 246; *Nisbet's Trs. v. Halket*, 20 Feb. 1885, 13 Sh. 497.

(k) 10 & 11 Vict., cap. 47, § 28.

(l) *Farmer v. Elder*, 1688, M. 14,003; *Gordon v. Maitland*, 1757, M. 11,166; *Rosebery v. Primrose's Crs.*, 1766, 5 Br. Sup. 926; correct Ersk., 8, 8, 71.

(m) *Blount v. Nicolson*, 1783, M. 9731.

(n) *Jordanhill v. Edmiston*, 1687, M. 14,682; and see *Kirkpatrick v. Irvine*, 17 Feb. 1888, 16 Sh. 608.

(o) *Burnet v. Leper*, 1665, M. 5863,

14,682; *White v. Hay*, 1698, M. 14,683; *M'Millan v. Tait*, 1775, M. 14,683.

(p) Ersk. 8, 8, 50; 1 Bell's Com. 5th ed. 659.

(q) See *Maitland v. Maitland*, 1757, 5 Br. Sup. 860.

(r) 1695, c. 24. See Cod. lib. 6, tit. 30; De jure deliberandi, l. 22.

(s) It is to be understood that the heir is liable absolutely to fulfil his ancestor's obligations in regard to the sale or transference of the lands to which he enters; *Burke v. Mackay*, 27 March 1865, 8 Macph. 799. For the mode of procedure under the old form of service *cum beneficio inventarii*, see Bell's Pr. § 1926; 1 Com. 5th ed. 662.

cum beneficio inventarii has been superseded by the provisions of CHAPTER LXXI. the Service of Heirs Act, (t) according to which a general service may be applied for and obtained, to a limited effect, by annexing to the petition for service a signed specification of the subjects to which it is intended to be applicable. A service limited by specification infers liability for the deceased's debts and deeds, only to the extent or value of the lands and heritages contained in the specification.

2231. Entry by a stranger who is not entitled to the character of heir does not infer passive liability, and intromission in such a case makes the person only liable to account. (u) And where an heir makes up a title merely for the purpose of conveying to the ancestor's general disponee, or intromits at the request of creditors and for their benefit alone, he is no further liable than as a constructive trustee. (x) The omission or refusal to renounce when charged to enter heir, or when cited in an action of constitution, which is now equivalent to a charge, (y) infers personal liability, but only for the purposes of the action. (z) Of the same nature is the liability incurred by stating and insisting in a peremptory defence to an action of constitution. (a) Liability is not inferred from pleading a defence which does not imply that the party has the title of heir. (b) And where a party closed a record on the alternative defences that he did not represent the ancestor, and that the debt was not due, he was held not to have incurred passive representation. (c)

2232. The doctrines recognised in relation to the liabilities of heirs entered *cum beneficio inventarii*, appear to be generally applicable to the case of representation limited to the value of the estate by specification. The following are the points of chief importance: (d)—1. The position of the heir is that of an absolute proprietor, with a personal responsibility for his ancestor's debts, that responsibility, however, being limited to the value of the estate. His possession therefore cannot be regarded as equivalent to diligence on the part of the ancestor's creditors, to secure their preference under the Act 1661, cap. 24. In actions against the

Passive representation not incurred by entry without having a beneficial title.

Duties in relation to creditors of an heir entering with a limited representation.

(t) 10 & 11 Vict., c. 47, § 25.

(u) *Mercer v. Scotland*, 1745, M. 9786; Elch. "Provisions to Heirs and Children," No. 8.

(x) *Walker v. Home*, 4 Dec. 1827, 6 Sh. 204.

(y) See 10 & 11 Vict., c. 45, § 16.

(z) *Richan v. Hill*, 22 Dec. 1832, 11 Sh. 237. See Statute 1540, c. 106.

(a) Ersk. 3, 8, 98; *Carfrae v. Telfer*, 1675, M. 9711; *Lundy v. Sinclair*, 1713, M. 12,064; *Gilmour v. Campbell*, 14 Dec. 1821, 1 Sh. 216. N. E. 205.

(b) *Wilson v. Short*, 1717, M. 9715.

(c) *Smith v. Drummond*, 25 June 1829, 7 Sh. 792.

(d) See 1 Bell's Com. 5th ed. 663.

CHAPTER LXXI. heir the conclusion will be for a personal decree; and the proper tenor of that decree is "decerning against him for the debt, reserving to him his objections against full payment."(*e*) 2. The heir, like an executor, is entitled to pay *primo venienti*, unless there is reason to apprehend that the estate may be insufficient, in which case he must bring a multiplepoinding. If the heir pay in good faith to first comers, subsequent creditors seem to have no redress either against the heir or against the creditors who have received payment in full.(*f*) 3. While the estate remains in the hands of the heir unexhausted by actual payment, no preference is acquired by creditors, either by citing the heir or obtaining decree of constitution against him; but the estate, or so much of it as remains unexhausted by payment, is a fund in the heir's hands, on which the creditors are to be ranked preferably, according to the diligence they have used for attaching it;(*g*) or *pari passu*, if no real diligence have been used.(*h*) 4. The heir is entitled to sell the estate unless restrained by inhibition, but is liable to account to the ancestor's creditors for its value as at the vesting of the succession. It would seem that, in the accounting, the heir is not allowed to take credit for the cost of improvements,(*i*) unless he has previously taken the precaution of having the value ascertained by a process of cognition or declaratory action.(*k*) 5. The heir is bound either to pay the debts or to assign the property;(*l*) and where there is a plurality of creditors, they may insist on bringing the estate to a judicial sale.(*m*)

Heirs of provision and disponees represent the ancestor only to the value of the estate.

2233. II. LIABILITY OF HEIRS OF PROVISION AND DISPONEES.—Heirs of provision, succeeding under a deed of simple destination, incur a passive liability, but only to the extent of the value of the succession. This proposition, which was disputed by Erskine,(*n*) is held to have been settled by the case of *Baird v. The Earl of Rosebery*(*o*) in the last century, and has been assumed in many modern deci-

(*e*) *Gordon v. Ross*, 1741, M. 5352.

(*f*) See *Catheart v. Moodie*, 1804, M. "Heir and Executor," App. No. 2, and the cases in relation to payments by executors, *infra*, § 2244.

(*g*) *Scott v. Burnet*, 1724, M. 5336.

(*h*) *Lawson v. M'Dougal's Crs.*, 1738, M. 5348. An heritable security granted without fraud has been held equivalent to payment; *Veitch v. Young*, 1738, M. 5345. But where the security is granted for a voluntary provision, its validity will depend on the question whether there is a sufficiency of free funds after the payment

of creditors; *Bruce v. Bruce*, 9 June 1831, 9 Sh. 695.

(*i*) *Aikenhead v. Russel*, 1727, M. 5344.

(*k*) *Gray v. M'Caul*, 1738, M. 5345.

(*l*) *Vint v. Hawley*, 1712, M. 5335; *Douglas v. Pringle*, 1724, M. 5335.

(*m*) *Strachan's Heirs v. His Creditors*, 1738, M. 5348; and see Ersk. 3, 8, 70.

(*n*) Ersk. 3, 8, 51.

(*o*) *Baird v. Earl of Rosebery*, 1766, M. 14,019; affirmed, but on a different point, 1767, 3 Pat. 651; *Mercer v. Scotland*, 1745, M. 9786; *Maitland v. Maitland*, 1757, 5 Br. Sup. 860. See Professor Bell's remark, in a note on this point, 1 Com. 5th ed. 659.

sions.(p) A gratuitous donee is virtually an heir of provision, though he does not require to make up a title by service. He therefore represents the settlor to the extent of the succession.(q) An heir of provision or donee who is *alioquin successurus*, is liable as an heir-at-law, and may, if necessary, obtain an entry limiting his responsibility.(r) Trust-donees represent their constituent to the extent of the estate, and must observe the rules of equitable distribution.(s) A donee cannot escape payment by refusing or delaying to declare his acceptance of the estate,(t) nor does it affect his liability to creditors and legatees that he possesses upon a title obtained from the heir-at-law, instead of that given by the ancestor.(u)

2234. It may be observed that, in the cases which have occurred for decision upon the passive liability of donees, the conveyance to the heir has usually been expressed to be under the burden of debts; and it seems to have been considered at one time that, in the absence of any such declaration, the ancestor's creditors would not have direct recourse against the donee, and that they would require to reduce the disposition under the Act 1621, cap. 18, in so far as prejudicial to their interest. But this proceeding has been found to be unnecessary, the liability of the donee being rested on the principle of representation under a gratuitous title.(x) Donees are not liable for provisions *ultra valorem* of the inheritance, by reason of their being taken personally bound to pay them as a condition of acceptance.(y) The liability of a gratuitous donee for the ancestor's debts, transmits against his representatives in the estate.(z) Where the estate has been converted, the general representatives of the heir would seem to be responsible to the extent of the price, the ultimate liability falling upon those into whose possession the funds are traced.

2235. Where the estate is insufficient for the payment of all the claims by which it is affected, the creditors are entitled to have it sold, and the proceeds distributed according to the order of the prefer-

Whether creditors have direct recourse against a donee where estate not specially subjected to payment of debts.

Right of the ancestor's creditors to bring estate to sale.

(p) See *Dewar v. Burden*, 8 D. 90, 7 Bell, 32, and other cases on imperfect entails, cited *infra*, § 2240.

(q) *Webster v. Greig*, 9 Dec. 1802, Hume, 436; *Murray Kynynmound*, 1744, M. 9881; and other cases, pp. 9877-9890.

(r) *Codrington v. Johnstone's Trs.*, 31 March 1824, 2 Sh. (Ap. Ca.) 118.

(s) See chapter 67 (Trusts for Payment of Debts).

(t) *Montgomerie v. Montgomerie*, 1737, M. 9878; Elch. "Implied Will," No. 2.

(u) *Wylie v. Ross*, 12 Nov. 1825, 4 Sh. 172; 12 June 1827, 2 W. & S. 576.

(x) *Bruce v. Bruce*, *infra*. The notion of a reduction being necessary derives some support from an incidental observation of Professor Bell; 1 Com. 5th ed. 98, and note 7.

(y) *Bruce v. Bruce*, 13 Dec. 1826, 5 Sh. 119; *Smith v. Marshall*, 1780, M. 2822.

(z) *Horne v. Marquis of Breadalbane's Trs.*, 23 Jan. 1835, 18 Sh. 296.

CHAPTER LXXI. ences they may have acquired by the use of real diligence. Onerous creditors of the ancestor are, of course, preferable to claimants of gratuitous provisions made chargeable against the estate. Where an heir taking under a disposition had given heritable security to the younger children for their provisions, and the estate ultimately proved to be insufficient for the liquidation of the ancestor's liabilities (though it was alleged that it would have yielded a surplus had it been sold without delay), it was held that the infestment of the younger children gave them no right to compete with the ancestor's creditors.(a)

Grantees of gratuitous provisions charged on the estate are preferable to the heir.

2236. Where an estate settled upon the heir is expressly charged with the payment of gratuitous provisions, as where there is a trust declared for payment of legacies, or where provisions to the widow and younger children are made real burdens on the property,(b) the right of the heir is obviously of the nature of a residuary interest; and, in the event of his bankruptcy, the special legatees are preferable to the creditors of the heir, who can only take the estate subject to the existing burdens. Even where the heir has possessed upon the personal title of the disposition, creditors are bound by the conditions of the grant, on the principle that adjudgers take *tantum et tale*; and in a case of this description, the Court granted interdict against the creditors of the disponee constituting their debts with the view of adjudging the estate from him in the character of heir-at-law.(c)

Whether the statutory preference of the ancestor's creditors to the heirs, applies to heirs of provision.

2237. In a competition between unsecured creditors of the ancestor and those of the disponee, the rules of preference established by the Act 1661, cap. 24, would seem to be applicable,(e) and they have been held to be so in the case of proper heirs of provision.(f) With reference to the duties of heirs of provision and disponees in relation to creditors, we refer to our previous observations in treating of the entry of heirs by limited titles.(g)

Passive representation of a liferenter.

2238. The decisions do not suggest any specialties in relation to the passive liability of liferenters. The right of the creditor is

(a) *Bruce v. Bruce*, 9 June 1831, 9 Sh. 695, overruling *Remington, Crawford & Co. v. Bruce*, 10 Dec. 1829, 8 Sh. 215.

(b) *Boyd v. Boyd*, 5 July 1851, 13 D. 1802. Here the widow of an heir of entail, who had taken infestment on a bond of provision granted under the powers of the entail in her favour, was found to have acquired a preference both for arrears and future payments, entitling her to priority in competition with an adjudging creditor of the heir in possession, whose adjudica-

tion of the life-interest was subsequent in date to the widow's infestment.

(c) *Miller v. Wright*, 4 July 1835, 13 Sh. 1088; and see *Paul v. Boyd*, 22 Jan. 1833, 11 Sh. 292.

(e) See Lord Moncreiff's opinion in *Bruce v. Bruce*, 9 Sh. 709; *Borthwick v. Hilson*, 16 June 1838, 16 Sh. 1158.

(f) *Graham v. M'Queen*, 1711, M. 3128; *Mackay v. Mackay*, 1788, M. 3137.

(g) *Supra*, § 2232.

to attach the ancestor's estate into whose hands soever it may come. CHAPTER LXXI.
In the case of an estate disposed *mortis causa* to one person in life-rent and to another in fee, the adjudication will be directed against both; and in the event of the lands being sold, the reversion will belong to the liferenter and fiar for their respective interests.

2239. Where estate is settled in strict entail, the heir of entail (although *alioquin successurus*) does not incur any passive representation of his ancestor. ^{Heir of entail does not represent his ancestor.} (h) This is a consequence of the doctrine that heirs of provision are only liable to account for the estate which might have been attached in the ancestor's hands. In the case of a strict entail, the estate cannot be affected with debt, except to the extent of the debtor's life-interest; and the heir who takes the estate unencumbered, incurs no personal liability for the debts or deeds of his ancestor. It was foreseen by the framers of the "Act concerning Tailzies," (i) that in the case of a contravention of the prohibition against contracting debt, the next heir would at common law incur a passive liability, and that the debt would thus be kept up against the estate. To obviate this consequence, it is provided, that the next heir of tailzie may, in case of contravention, "serve himself heir to him who died last infeft in the fee and did not contraveen, *without necessity anyways to represent the contraveener.*" Where, therefore, an heir of entail is not represented by the next substitute, his obligations in relation to the entailed estate can only be enforced against his personal representatives (k) or general disponees. (l)

(h) Ersk. 3, 8, 51, "Heirs by an entail, fenced with irritant and resolute clauses, are liable for no debt contracted by the former heir contrary to the directions of the entail." See also Bankt., vol. 2, p. 343; *Syme v. Dewar*, 1803, M. 15,619. It must be observed, however, that in relation to the entailer himself, not only the institute or first taker, but all subsequent heirs, incur the ordinary passive liability of heirs of provision, that is, to have the estate adjudged from them for the entailer's debts; *Jardine v. Lockhart*, 14 June 1838, 11 Sh. 720; *Dickson v. Dickson*, 1786, M. 15,534, and note to 5 W. & S. 662; *Dickson v. Cuninghame*, 1 Oct. 1831, 5 W. & S. 657; *Scott v. Scott*, 1713, M. 15,569, Rob. 226; *Lindores v. Stewart*, 1714, M. 7735. The principle is, that a settlor cannot place his estate beyond the reach of his creditors; and it admits of exception only where, as in the *Sheuchan* case, a proprietor, being solvent, becomes a party to a mutual settlement for onerous causes;

Vans Agnew v. Stewart, 31 July 1822, 1 Sh. Ap. Ca. 820; or settles his estate in strict entail under the terms of a contract of marriage; *Schaw v. Schaw*, 1715, M. 15,572.

(i) Stat. 1685, cap. 22.

(k) *Fraser v. Fraser*, 29 May 1827, 5 Sh. 722, N. E. 673; 29 Jan. 1830, 8 Sh. 409; 25 Feb. 1831, 5 W. & S. 69; *Anstruther v. Lockhart*, 26 June 1827, Sh. Teind Ca. 188; *Fraser v. Agnew*, 28 Feb. 1830, 8 Sh. 585; 2 April 1831, 5 W. & S. 249; *Ross v. Hawkins*, 14 June 1848, 10 D. 1288; *Mackenzie v. Mackenzie*, 15 Feb. 1849, 11 D. 596. Charges upon entailed estates under the Entail and Railway Acts, etc., do not bind subsequent heirs unless the forms are strictly observed; *Moncrieff v. Todd*, 27 May 1825, 1 W. & S. 217; *Scottish Midland Ry. Co. v. Gray*, 20 Dec. 1850, 13 D. 410; *North British Ry. Co. v. Ranton*, 15 Jan. 1864, 2 Macph. 442.

(l) *Fraser v. Mackay*, 13 Feb. 1833, 11 Sh. 391.

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Rule does not apply where entail defective in relation to prohibition against contracting debt.

2240. Under the old law, if an entail were defective in the prohibition respecting the contraction of debt, or in the restraining clauses applicable to that prohibition, the estate was liable for the obligation of the heirs of entail, not only during the respective periods of their possession, but in the hands of the succeeding heirs. Thus, in the case of *Mitchelson v. Atkinson*,^(m) an action of constitution at the instance of a creditor of a deceased heir, it was found "that the tailzie of the estate of Powmill is defective in the resolute clause, and that the defender, by taking up the estate under it, has incurred a representation to his predecessor as heir of provision, and is responsible for his debts." Where the contraction of debt is effectually prohibited, there is no place for general passive representation ;⁽ⁿ⁾ though the heir might, for example, be required to implement the ancestor's contract of sale, if the entail permitted selling.^(o) An unrecorded entail, upon which infestment has been taken, is in the same position, with regard to creditors contracting on the faith of the records, as an entail defective in the prohibition against contracting debt. Creditors may accordingly attach the estate in the hands of subsequent heirs of entail.^(p)

Extension of passive liability under Entail Amendment Act to all cases of defective entails.

2241. Under the provisions of the 43d section of the Entail Amendment Act,^(q) by which entails defective in respect of any of the statutory prohibitions are rendered invalid for all purposes, it is declared that "The estate shall be subject to the deeds and debts of the heir then (at the date of the Act) in possession, and of his successors, as they shall thereafter in order take under such tailzie." The effect of this clause is to extend the limited passive representation of heirs of provision to all cases of defective entails, giving at the same time a preference to the ancestor's creditors over those of the heir. To the extent to which an entailed estate may be burdened under special powers, the liability of an heir of entail is assimilated to that of an heir of provision.^(r)

^(m) *Mitchelson v. Atkinson*, 15 June 1831, 9 Sh. 741; *Sinclair v. Dunbar*, 18 July 1845, 7 D. 1085; *Scott v. Tawse*, 10 June 1828, Sh. Teind Ca. 163; *Nisbet's Trs. v. Halket*, 20 Feb. 1835, 13 Sh. 497.

⁽ⁿ⁾ *Dewar v. Burden*, 26 Nov. 1845, 8 D. 90; 25 March 1850, 7 Bell, 82; *Cochrane v. Vernor*, 21 Feb. 1844, 6 D. 723.

^(o) See chap. 31, sect. 8 (Imperfect Entails). Observe, as a consequence of the doctrines recognised in relation to improper tailzied destinations, that heirs whatsoever succeeding under an entail *are*, but heirs-portioners *are not*, liable in a passive re-

presentation of the preceding heir; the latter succeeding as proper heirs of tailzie and provision; *Farquhar v. Hamilton*, 3 Feb. 1842, 4 D. 600.

^(p) See the cases on this point cited in chapter 32, section 3 (Statutory Requisites of a Strict Entail); also *Jolly v. Graham*, 24 Feb. 1824, 2 Sh. 780, N.E. 611; and *Kerr v. Duke of Roxburghe*, 18 Jan. 1831, Sh. (Teind Ca.) 245; 7 Aug. 1833, 6 W. & S. 526.

^(q) 11 & 12 Vict., cap. 86.

^(r) *Howden v. Porterfield*, 17 June 1834, 12 Sh. 734, 14 May 1835, 1 S. & M.L. 739.

2242. An heir to a lease excluding assignees and sub-tenants would seem not to be liable in a passive representation, otherwise than as an heir of provision. (s) CHAPTER LXXI.
Liability of the heir to a lease.

2243. III. LIABILITY OF EXECUTORS AND LEGATEES.—By confirmation as executor, a passive representation is incurred, limited to the value of the estate confirmed, (t) the executor being always bound to the observance of a due course of administration. (u) Without entering in detail into the question of what is a due course of administration (which rather pertains to the subject of the ensuing chapter), we may observe that an executor is generally entitled to pay *primo venienti*, after the elapse of six months from the ancestor's death, (x) unless he is previously interpellated by other creditors, or has reason to believe that the executry-estate is insolvent. (y) The executor may, in the exercise of a reasonable discretion, require the creditor to constitute his claim against the estate, (z) and where the assets are insufficient to meet the liabilities, he may either apply to the proper Court for sequestration of the estate of the deceased, or may institute a process of multiplepoinding for the distribution of the funds which he has reduced into possession. Reference is made to a previous chapter on the subject of the liability, under the Act 1695, cap. 41, of next of kin charged to confirm, and refusing either to confirm or to renounce the succession. (a) Limited representation of executors, and their duties towards creditors.

2244. A creditor of the deceased, who receives payment of his claim in full out of the executry-estate, cannot be compelled to refund any part of the money so received on the ground of the insufficiency of the executry-estate to meet the claims against it. (b) In such a case, it is therefore a question between the executor and the other creditors, whether the former is liable to them by reason of his having prematurely parted with the funds intrusted to his care; and where the payment is proved to be premature, he will undoubtedly be personally responsible. Executor has no claim for repetition where estate proves insufficient.

2245. Where a claim against an heir or executor is successfully Liability for costs of litigation to determine whether liability attaches to real or personal estate.

(s) *Campbell v. Gallanach*, 11 July 1806, Shaw's Bell's Com. p. 895.

(t) *Ersk.*, 3, 9, 41; *Stair*, 3, 8, 64; *Bell's Pr.* § 1922.

(u) As to the personal liabilities which may be incurred by trustees and executors in respect of contracts made or adopted by themselves, or by reason of negligence in the administration of the estate, see chap. 63, sect. 1 (Realisation and Management), and chap. 78 (Liabilities of Trustees). As to the mode of proceeding against executors and next of kin for the ancestor's debts, see chap. 52 (Office of Executor).

(x) *More's Exrs. v. Malcolm*, 24 Jan. 1835, 18 Sh. 813; *Gardner v. Pearson*, 28 Nov. 1810, F.C.; *Alison v. Earl of Dundonald's Trs.*, 1793, M. 16,211.

(y) *Gardner v. Pearson*, *supra*; and see *Rankine v. Gardiner*, 1741, M. 16,201.

(z) *Jackson's Trs. v. Black*, 31 May 1832, 10 Sh. 597; *Crawford v. Cook*, 16 Feb. 1833, 11 Sh. 406.

(a) Chapter 52 (Office of Executor), see § 1678.

(b) *Cathcart v. Moodie*, 17 Feb. 1804, M. "Heir and Executor," App. No. 2.

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Representation
incurred by
legatees and
beneficiaries.

2246. A legatee or beneficiary who has received payment of his share of the succession, is liable to be sued, in an action of repetition, by creditors of the executry-estate whose claims have not been provided for by the executor ;(e) but it would seem that such claims are only admitted after discussion of the proper legal representatives.(f) The acceptance of a legacy or provision of heritage does not infer a general representation of the testator, but only a liability to make the value of the legacy or provision forthcoming to his creditors.(g) Where an executry-estate is sufficient for the payment of debts and legacies in full, if a creditor chooses to lie by, and does not bring forward his claim until after the executor has become bankrupt, he is held to be barred by his own negligence from proceeding against legatees, whose shares were satisfied out of the free succession.(h)

Representation,
in what cases
incurred by
executors-
creditors.

2247. Executors-creditors do not incur any passive representation, unless for vitious intromission in excess of the value stated in the inventory ; for the confirmation of executors-creditors is only a diligence, and not a title of administration.(i) Heirs or legatees have recourse against other legatees, in respect of erroneous payments, subject to certain obvious qualifications with respect to *mora* and acquiescence.(k)

(c) *Lord Lovat v. Fraser*, 26 April 1866, 1 L. Rep. Sc. Ap. 24.

(d) *Renton v. Renton*, 14 Nov. 1851, 14 D. 35. The important question in this case was, whether the executor was liable *ultra fines inventarii*; upon this point the authority of the decision is obviously strengthened by the decision of the House of Lords in the last mentioned case.

(e) *Stair*, 8, 8, 70; *Grierson v. Wallace*, 16 May 1821, 1 Sh. 13, N. E. 9; *Poole v. Anderson*, 22 Feb. 1834, 12 Sh. 481.

(f) *Clelland v. Baillie*, 18 Feb. 1845, 7 D. 461.

(g) *Brunton v. Thomson*, 7 Dec. 1832, 11 Sh. 190.

(h) *Maccomie's Exrs. v. Strachan*, 1760, M. 8087; but see *Bruce v. Bruce*, 9 June 1831, 9 Sh. 695.

(i) 2 Bell's Com. 5th ed. 85.

(k) *Ross v. Mackenzie*, 18 Nov. 1842, 5 D. 151; *Gray v. Walker*, 11 March 1859, 21 D. 709.

SECTION II.

REPRESENTATION OF APPARENT HEIR THREE YEARS IN POSSESSION.

2248. In consequence of the frauds and disappointments suffered by creditors upon the decease of their debtors, through the contrivance of apparent heirs,^(l) it was found necessary to provide by Statute that the possession of an estate upon the title of apparen-
Estate possessed for three years upon the title of apparen-
 cy rendered liable to debts and deeds of possessor.
 cy without service, when continued for three years, should have the effect of rendering the estate liable to the debts and deeds of the heir in possession, after his decease.^(m) This enactment creates an exception to the general rule of vesting of heritable estate, according to which the right of an apparent heir lapses by death, and the title passes, not to his heir, but to the heir of the person who died last vest and seised as of fee in the estate. Its object is to protect creditors against the loss to which they were exposed under the ancient law, which gave to the apparent heir all the rights of a proprietor during his lifetime, while freeing the estate from liability after his death.

2249. In the construction of this enactment, it is a settled principle, that the Statute does not apply unless the heir have actually possessed the subject. The possession may either be natural or civil, personal or by another ;⁽ⁿ⁾ it is not enough that the heir had the title of apparen-
What acts of possession are sufficient to subject the estate to liability under the Statute.
 cy, but was unable to obtain possession. The possession of a trustee for creditors, or of a trustee or factor in a sequestration, is not held to be the possession of the heir.^(o) It would appear that the heir cannot have the possession contem-

(l) Preamble to Stat. 1695, cap. 24.

(m) Act for obviating the Frauds of Apparent Heirs, 1695, cap. 24. After the narrative cited in the text, the Statute proceeds: "That if any man since the 1st of January 1661 have served, or shall hereafter serve himself heir; or, by Adjudication on his own Bond, hath since the time foresaid succeeded, or shall hereafter succeed, not to his immediate Predecessor, but to one remoter, as passing by his Father to his Goodsire or the like: Then, and in that case, he shall be liable for the Debts and Deeds of the person interjected, to whom he was apparent Heir, and who was in the possession of the Lands and Estate, to which he is served, for the space of three years, and that in so far as may extend to the Value of the said Lands and Estate, and no farther, deducting the

debts already paid: As also with the order, *as to the time past*, That all the true and lawful Debts of the Apparent Heir, entering as said is and already contracted, with the true and real Debts of the Predecessor, to whom he enters shall be preferred in the first place." See Ersk. 8, 8, 93 and 94; 1 Bell's Com. 5th ed. 664; Pr. § 1929, *et seq.*

(n) *Yule v. Ritchie*, 1758, M. 5299. And see as to the possession of tutors and factors for minors, *M'Brair v. Maitland*, 1736, Elch. "Passive Title," No. 4; *Johnston v. Steel*, 1738, M. 9809; Elch. "Passive Title," No. 3; *Bremner v. Campbell*, 17 May 1841, 1 Bell, 280.

(o) *Buchan v. MacDonald*, 1796, M. 9822, Hume, 482; *Donald v. Colquhoun*, 27 Feb. 1835, 18 Sh. 574.

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plated by the Statute, when the estate is *de facto* in the occupation of a liferenter on a valid title. (*p*) But where an heir had actually possessed lands inherited from his mother, the father having waived his right of courtesy, the creditors were held to have a claim under the Statute. (*q*) And if an apparent heir grant an heritable title to another, as a liferent right, or a joint interest in the rents, in pursuance of a compromise of competing claims, the possession of the grantee is held to be that of the apparent heir. (*r*) But it is doubtful whether the Statute will apply where the heir's possession is on a title different from apparency, which turns out to be invalid. (*s*)

Estate not liable for gratuitous deeds of the apparent heir; *secus*, as to deed granted for a rational consideration.

2250. The Statute does not render the estate liable for gifts or engagements of the heir preceding upon merely gratuitous—as distinguished from rational—considerations, such as *mortis causa* settlements, (*t*) entails, (*u*) or provisions to collateral relatives, though contained in marriage-contract settlements. (*x*) But provisions to wives and younger children, if reasonable in amount, are held to be within the scope of the enactment. (*y*) And all the onerous obligations of the heir in relation to the lands, equally with contract debts, as leases, conveyances with warrandice, and, of course, marriage-contract provisions, are enforceable against the estate under the Statute. (*z*) Where an apparent heir disposed the estate by gratuitous deed under the fetters of an entail, along with other lands to which his title was complete, the next heir was held bound, by acceptance of the disposition, to complete a title to the lands held by his ancestor on apparency under the fetters of the entail. (*a*) Absolute warrandice presumes a valuable consideration, and brings the deed containing it under the protection of the Statute. (*b*) The debts of an heir possessing on apparency under an unrecorded personal entail, cannot be made effectual against the next heir, the conditions of the entail being binding. (*c*)

No action will lie under the Statute against the next heir, where he also possesses on apparency.

2251. According to the terms of the Statute, the heir against

(*p*) *M'Caul's Crs. v. M'Caul*, 1745, M. 9748; *Pitcairn v. Lundin*, 1752, M. 9749; *Grant v. Sutherland*, 1756, M. 5265, 1 Cr. St. & Pat. 416.

(*q*) *Knox v. Irvine*, 1760, M. 5276.

(*r*) *Corbet v. Porterfield*, 20 June 1889, 1 D. 1038; 11 July 1842, 1 Bell, 476.

(*s*) See Ersk. 3, 8, 94; 1 Bell's Com. 5th ed. 665.

(*t*) *Lindsay v. University of Glasgow*, 1794, Hume, 429.

(*u*) *Marquis of Clydesdale v. Earl of Dundonald*, 26 Jan. 1726, Rob. 564.

(*x*) *Erskine v. Erskine*, 1795, Hume, 431.

(*y*) *Russell v. Russell*, 7 Dec. 1852, 15 D. 192; *Kennedy v. Kennedy*, 11 Feb. 1829, 7 Sh. 397.

(*z*) *Muirhead v. Muirhead*, 1724, M. 9807; *Graham v. Countess of Glencairn*, 1800, M. "Heir-Apparent," App. No. 1; 7 July 1806, 5 Pat. 134; *Ogilvy v. Ogilvy*, 16 Dec. 1817, F.C.

(*a*) *Carmichael v. Carmichael*, 15 Nov. 1810, F.C.; 15 May 1816, 6 Pat. 155.

(*b*) *Taylor v. Hutton*, 2 June 1854, 16 D. 885.

(*c*) *Graham v. Graham's Crs.*, 1795, M. 15,439. See the doctrine of personal entails examined in chapter 38, section 2.

whom the liability is to be enforced must be served heir, or have made up a title by adjudication on his own trust-bond. After some conflict of opinion and authority, it was finally settled by the House of Lords that an action under the Statute cannot be maintained against an heir who himself possesses on apparency.^(d) Entry by precept of *clare constat* has been held equivalent to special service, and sufficient to support the passive title.^(e) Adjudication by a confident person on a bond or disposition gratuitous, or for a small consideration, is held equivalent to entry by adjudication on a bond expressly in trust.^(f) It is to be observed, that the statutory liability is not confined to the case where the heir makes up a title connecting himself with the immediate predecessor of the apparent heir, but applies to his entry, as heir, to any predecessor, however remote.^(g) But where two or more heirs have possessed upon apparency, in sequence, it does not appear from the terms of the Statute that the estate would be liable for the debts of any but the heir last in possession, who, on a fair construction, is the heir described as the person interjected.^(h)

2252. The responsibility of an heir, making up a title, for the obligations of his predecessor possessing on apparency, is of the nature of a personal representation,—limited, however, to the value of the estate, deducting debts already paid. The creditors of the apparent heir, therefore, must begin by constituting their debts against his successor; but it would appear that, if the latter renounce, decree *cognitionis causa* cannot be obtained, as the Statute gives no direct recourse against the estate. It has not been positively determined, whether the creditors of an apparent heir upon contract debts have the preference over the heir's creditors introduced by the Act 1661, cap. 24. Professor Bell, founding on the absence of any restriction in the last-mentioned Act, and on the special saving clause annexed to this branch of the Act 1695, comes to the conclusion that the ancestor's creditors are entitled to a preference.⁽ⁱ⁾ Creditors upon contracts in relation to the estate, such as minutes of sale and other imperfect conveyances, appear to have

Nature and extent of the statutory passive representation incurred by the successors of apparent heirs.

^(d) *Grant v. Sutherland*, 1754, M. 9819; 15 April 1755, 1 Cr. St. & Pat. 605; *Leith v. Lord Banff*, 1741, M. 9815, Elch. Notes, p. 318. See also Ersk. 8, 8, 94; Kames, Pr. of Equity, 184; 1 Bell's Com. 5th ed. 666.

^(e) *Broun v. Henderson*, 16 July 1852, 14 D. 1041.

^(f) *Burns v. Picken*, 1758, M. 5278; 5 Br. Sup. 361; *Murray v. Ramsay & Co.*, 17 Jan. 1811, F.C.

^(g) *Hay v. Hay*, 1775, M. 9755; Hailes, 607.

^(h) But see *Erskine v. Erskine*, 1795, Hume, 431.

⁽ⁱ⁾ 1 Bell's Com. 5th ed. 666. It appears that, in a question between creditors of the apparent heir, a preference cannot be acquired by the use of inhibition; *Sutherland v. Sutherland*, 1786, M. 5294.

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the power of acquiring preferences by adjudging in implement, since adjudication in implement is not subject to the *pari passu* preference of ordinary adjudgers. (k) The Statute declares that the deeds as well as the debts of the apparent heir shall be effectual against the heir who enters, and the proper mode of making an ancestor's deed effectual against the heir is by adjudication in implement. (l) It has, however, been held that a lease, granted by the apparent heir, is ineffectual in competition with the creditors of the heir who enters. (m)

Operation of the Statute not confined to cases where apparent heir succeeded by his heir-at-law.

2253. The Statute appears to contemplate only the case where the heir who enters is heir-at-law to the heir dying in apparenacy. But according to the decisions its operation is not confined to such cases; only the responsibility of the entered heir, if not heir-at-law or personal representative, is subsidiary to that of the persons who possess these characters, and he is entitled to the benefit of discussion (n) and of relief. (o)

SECTION III.

PREFERENCE OF THE ANCESTOR'S CREDITORS TO THOSE OF THE HEIR AND EXECUTOR.

Ancestor's creditors entitled to preference over heir's, limited to three years as to heritable, and one as to moveable estate.

2254. The creditors of the ancestor are in reason entitled to a preference over those of the heir, because the latter have no claim except to the free succession *debitis deductis*. It is, however, no less consonant to equity, that the claim of the ancestor's creditors should be limited to a reasonable time after the opening of the succession, and that the heir should not be allowed to obtain credit on the faith of his possession of an estate, while it is subject to an unlimited hypothec for the obligations of the former proprietor. The law of Scotland allows to the creditors of the ancestor a preference over the real estate in the hands of his heir, limited to the period of *three years*; and a claim against purchasers limited to *one year*. (p) The first-mentioned periods might, we think, be materially ab-

(k) Stat. 1661, c. 62; 1672, c. 19.

(l) See *Ogilvy v. Ogilvy*, 16 Dec. 1817, F.C.; *Simpson v. Hamilton*, 1707, M. 9807.

(m) *Loudon v. Murray*, 1752, M. 5270; *Killilung Tenants*, 1760, 5 Br. Sup. 877; *Gordon v. Milne*, 1780, M. 10,809.

(n) *Vint v. Earl of Dalhousie*, 1712, M. 8562. But there is no right of discussion as between the apparent heir and the general representatives of the person last vest in the estate; *Morris v. Beveridge*, 28 Nov. 1867. It would seem that the apparent

heir, although liable to be sued *primo ordine* for his ancestor's debt, is entitled to relief from the general representatives.

(o) *Marquis of Annandale v. Countess of Hopetoun*, 15 Feb. 1789, 1 Pat. 225. In *Ogilvy v. Ogilvy*, *supra*, the heir was held not to be entitled to relief, he being the heir entitled to succeed to the lands to which the ancestor's obligation had relation.

(p) Stat. 1661, cap. 24.

ridged without detriment to the interests of the ancestor's creditors. CHAPTER LXXI.
The preference over the moveable estate, which is limited to a year and day, (q) seems to be sufficient for all practical purposes.

2255. I. PREFERENCE UPON REAL ESTATE IN THE POSSESSION OF THE HEIR.—The Statute relating to the heritable succession, on the narrative that apparent heirs do frequently dispoise their estates, or suffer them to be adjudged, without respect to their predecessor's creditors, enacts, in the first place, (r)—“That the creditors of the defunct shall be preferred to the creditors of the appearand heir in time coming, as to the defunct's estate: Providing always that the defunct's creditors do diligence against the appearand heir, and the real estate belonging to the defunct, within the space of three years after the defunct's death.” (s) Where, therefore, the rights of the two classes of creditors are undisturbed by any attempt on the part of the heir to create preferences by way of conveyance to his creditors, it is requisite, on the part of the ancestor's creditors, if they mean to claim a preference over those of the heir, that they should use diligence, in terms of the Statute, within three years after the ancestor's death. The act is applicable to all real estate, comprehending everything that is liable to be attached by adjudication, whether heritable *ex sua natura*, or by destination. (t) But arrears of rent must be attached in the hands of the executor. (u)

Statutory preference of the ancestor's creditors where the heir continues in possession.

2256. The statutory preference is not confined to the case where the heir possesses on the title of apparency. It is clear that the heir could not deprive the ancestor's creditors of their preference by obtaining himself entered as heir at law; (x) and it has been held that the Statute applies to heritable succession in the hands of heirs of provision and disponees. (y) But where the heir was infest in his ancestor's lifetime, the Statute was held to be inapplicable, (z) and, in such a case, the remedy of the creditors is by action of reduction under the Act 1261, cap. 18. (a)

Preference not confined to case of heir possessing on apparency.

2257. On the question, what diligence is requisite to constitute a preference, the construction of the Act has been favourable to the object of its authors. It is held that the diligence must, if possible,

In what sense must the creditor complete his diligence within the three years allowed by the Statute.

(q) Stat. 1695, cap. 41.

(r) See the terms of the second branch of the Statute, cited *infra*, § 2260.

(s) “Act concerning Appearand Heirs, their payment of their predecessors', and their own debts;” 1661, cap. 24.

(t) *M'Kay v. M'Kay's Reps.*, 1783, M. 8187.

(u) *Hamilton v. Hamilton*, 8 April 1767, 2 Pat. 137; *Lord Banff v. Joas*, 1765, 5 Br. Sup. 912.

(x) 1 Bell's Com., 5th ed. 730.

(y) *Graham v. M'Queen*, 1711, M. 3128; and see Lord Moncreiff's note in *Bruce v. Bruce*, 9 June 1831, 9 Sh. 700. As to the case of an heir of entail, see *Boyd v. Boyd*, 5 July 1851, 18 D. 1302.

(z) *Arniston v. Ballenden*, 1685, 2 Br. Sup. 92.

(a) *Lamb v. M'Donald*, 1793, Hume, 428.

CHAPTER LXXI. be completed within the three years ; that is, the creditor must be infeft on a decree of adjudication, or have given a charge to superiors. (b) But where the creditor is obstructed by the heir himself, or by his creditors, and is thus rendered unable in the ordinary course of judicial proceedings to complete his diligence within the statutory period, his claim will be reserved, or he will be allowed to take decree *pro forma* within the time, under reservation *contra executionem* of the objections to his claim. (c) Inhibition is not diligence in the sense of this Statute, and does not, when used by a creditor of the ancestor, create any preference in favour of the inhibitor over those creditors of the heir whose debts are prior in date to the inhibition. (d) Nor is the entry of the heir under a limited representation equivalent to the constitution of a preference in favour of the ancestor's creditors. (e) The acquisition of a bond of corroboration or other collateral security from the heir, does not alter the position of the creditor as a claimant against the ancestor's estate. (f)

Statutory preference of the ancestor's creditors, how affected by the law of *pari passu* preference of adjudgers.

2258. The Statute under consideration is anterior in date to the laws introducing the *pari passu* preference of adjudgers, (g) and regulating the distribution of estates by judicial ranking and sale. (h) Accordingly, the acquisition of preferences under it may be aided, but cannot be defeated by those laws, which were not intended to interfere with the rules of preference previously established. Under the law of the *pari passu* preference of adjudgers, the first effectual adjudication by a creditor of the ancestor will entitle all the other creditors of the ancestor to the benefit of the *pari passu* preference, without the necessity of their severally completing their adjudications, provided these diligences are led within a year and day of the first effectual adjudication, and not later than three years after the ancestor's death. Creditors of the *heir* leading their adjudications within year and day after the first effectual, would have the benefit of the decree to the effect of ranking preferably, in the

(b) *Lord Ballenden v. Murray*, 1685, M. 8127; "The Lords found that the defunct's creditors ought to do exact and complete diligence against his estate within three years after his death, unless they could make it appear that their diligence was retarded without any fault of theirs, by opposition from the heir or other creditors, or the surcease of justice, or the like," cited in *Taylor v. Lord Braco*, 1747, M. 8128, 8182, and in 1 Bell's Com., 5th ed., 730. The case of *Paterson v. Bruce*, 1678, M. 8126, where it was held that no impediment could continue the three years, is disapproved by Professor Bell.

(c) Professor Bell, *supra*, expresses an unhesitating opinion to this effect, on the ground that in diligence a creditor is never chargeable with *mora* if he has used due exertion such as circumstances and judicial rules permit.

(d) *Menzies v. Murdoch*, 14 Dec. 1841, 4 D. 257.

(e) 1 Bell's Com., 5th ed., 730.

(f) *Ranking of Crl's Crs.*, 1781, M. 8137.

(g) Stat. 1661, cap. 62.

(h) First introduced by Statute 1681, cap. 7, and finally regulated by Acts of Sederunt 17 June 1756, and 11 July 1794.

second place, along with those creditors of the *ancestor* whose ad- CHAPTER LXXI.
judications, though led within year and day of the first effectual,
were not led within three years of the ancestor's death. Where
the first effectual adjudication is led by a creditor of the heir, the
benefit of the diligence enures in like manner to all creditors of
either class leading adjudications *debito tempore*,—the preference
as between adjudgers and non-adjudgers being determined by a
period of a year and day, counting from the first effectual adjudica-
tion ; while the preference as between creditors of the ancestor and
those of the heir is dependent on the diligence of the former being
led within three years after the ancestor's death.(i)

2259. In the case of a judicial sale or sequestration under the Bankruptcy Acts, it seems that the requisites of the Statute 1661 are sufficiently complied with by the ancestor's creditors when they claim their preference within the three years, the ancestor's estate being duly attached by the sequestration, or included in the process of sale. An action of judicial sale, whether brought by a creditor or by the apparent heir, is declared by the Statute to be equivalent to an adjudication as of the date of the first calling before the Lord Ordinary for all the creditors who shall afterwards be included in the decree of division, and no adjudications are allowed to proceed during its dependence.(k) This makes it competent for every other creditor, whether of the ancestor or of the heir, to claim a share in the division, and the entry of a claim is all the diligence that the case admits of.(l) Sequestration is by the Statute declared to be equivalent to "complete diligence" on the part of creditors;(m) but in order to entitle the ancestor's creditors to participate, it would seem that the ancestor's estate must be either expressly sequestrated or adjudged by the trustee.(n) The trustee's adjudication preserves the benefit of their statutory preferences to the ancestor's creditors lodging their claims within the triennial period.(o)

Effect of preference of ancestor's creditors where estate judicially sold or brought under sequestration.

2260. II. PROTECTION AGAINST CONVEYANCES BY THE HEIR.—The enacting words of the second branch of the Act 1661, cap. 24, are, "That no right or disposition made by the said appearand heir, in so far as may prejudice his predecessor's creditors, shall be valid unless it be made and granted a full year after the defunct's death."

Ancestor's creditors have a preference under the Statute over purchasers from the heir for one year.

- (i) 1 Bell's Com., 5th ed., 732, 733. 8134; 5 Bg. Sup. 875; *Irvine v. Maxwell*, 1748, M. 5264.
(k) 19 & 20 Vict., cap. 91, sect. 4. But this does not apply to adjudications in implement; *Wood v. Scott*, 5 Feb. 1833, 11 Sh. 355.
(l) *Russell v. Hamilton's Crs.*, 1760, M. 4 Sh. 717; 15 June 1829, 3 W. & S. 449.
(m) 19 & 20 Vict., cap. 79, sect. 102-7.
(n) *Ibid.* sect. 107.
(o) *M'Lachlan v. Bennet*, 15 June 1826, 4 Sh. 717; 15 June 1829, 3 W. & S. 449.

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What dispositions fall under the three years', and what under the one year's preference.

2261. The prohibition is applicable to all conveyances and deeds of security, and not merely to deeds granted by the heir in favour of his creditors, the object of the Statute being to protect the interest of the ancestor's creditors against voluntary conveyances pending the *annus deliberandi*.(p) Accordingly, conveyances to purchasers have been held reducible under the Statute at the instance of the ancestor's creditors.(q) As to dispositions to the heir's personal creditors, these have been held to be reducible if executed at any time within the three years during which the diligence of such creditors is postponed, on the ground that it would be unreasonable that creditors should obtain, by collusion with the heir, a preference which the law does not enable them to acquire by execution at their own instance.(r) The effect of the statutory prohibition is similar to that of the diligence of inhibition. The conveyance is bad as against creditors, but good as a contract with the purchaser. In the case, therefore, of a sale for a full price, the contract would stand, but the creditors would have a preference over the price. It is not necessary, in a question with the heir himself, that the ancestor's creditors shall have used diligence within the three years to give them a title to reduce conveyances under this branch of the Act.(s) Where there is competition between the ancestor's creditors and those of the heir, and the ancestor's creditors have not done diligence within the three years, it has been considered that they have an indirect preference, in the same manner as an inhibitor, but liable, like it, to be defeated by the creditors of the heir arresting the price in the hands of the purchaser.(t)

Preferences to individual creditor of ancestor or heir, in what cases reducible.

2262. Conveyances by the heir in favour of the whole of the ancestor's creditors are not objectionable under the Statute,(u) but preferences to individual creditors of the ancestor, if granted within a year and day after his death, are within the scope of the statutory prohibition.(x) A conveyance by the heir to one of his own

(p) 1 Bell's Com. 5th ed., 734; Ersk. 8, 8, 102. The Statute, as already mentioned, applies to heirs entered as well as unentered; *Mags. of Ayr v. M'Adam*, 1780, M. 8135; *Graham v. M'Queen*, 1711, M. 8128.

(q) *Paton v. Renny*, 21 Feb. 1835, 13 Sh. 509; *Taylor v. L. Braco*, 1847, M. 8128; *Bell v. Lothian*, 1773, M. 8134; *Mags. of Ayr v. M'Adam*, *supra*.

(r) "The defunct's creditors doing diligence within the three years are preferable, even where the heir disposes after the year; otherwise the heir's creditors would have more advantage by a volun-

tary disposition than they could have by legal diligence, which were absurd;" *Harcarse*, cited 2 Br. Sup. 98; also Ersk. 8, 8, 102, and 1 Bell's Com. 5th ed. 736.

(s) *Taylor v. L. Braco*, 1747, M. 8128, and *dictum* of *Harcarse* there cited; see 2 Br. Sup. p. 98.

(t) 1 Bell's Com. 5th ed., 736.

(u) *Arniston v. Ballenden*, 1686, 2 Br. Sup. 98.

(x) *Torrance v. Murdoch*, 23 Feb. 1842, 4 D. 774; and see judges' opinions in *Christie v. Royal Bank of Scotland*, 17 May 1839, 1 D. 745, 2 Rob. 118.

creditors is not challengeable by the rest of his creditors ;(y) and the heir's creditors do not seem to be entitled to participate in the benefit of a challenge at the instance of creditors of the ancestor.(z) CHAPTER LXXI.

2263. III. PREFERENCE OF THE ANCESTOR'S CREDITORS OVER THE MOVEABLE ESTATE.—At common law, the principle is recognised that, as an executor is a trustee of the ancestor's estate, his creditors must be postponed to those of the ancestor in the distribution of the executry estate.(a) Where the executor has not been confirmed, and the creditor is obliged to proceed by personal action against him, the preference is limited by Statute to one year.(b) But where confirmation has followed, the estate confirmed is thenceforth distinguished and set apart from the private funds of the executor ; and the preference of the ancestor's creditors over it will continue as long as the trust-fund exists as a separate estate, or is capable of being traced and identified.(c) Assignations of securities, constituting part of the executry-estate, in favour of the heir's private creditors, are reducible, under the Statute, within the year ; but payment in money, or by a bill, would seem to be effectual to the creditor, on the principle that a creditor is always entitled to accept payment in cash.(d)

Ancestor's creditors have a preference over unconfirmed moveable estate for one year.
After confirmation, without limitation in time.

SECTION IV.

IRREGULAR PASSIVE TITLES.

2264. I. PRÆCEPTIO HÆREDITATIS.—Where a person who is the heir presumptive accepts a gratuitous conveyance of the estate, he is said to be a "lucrative successor," and, as such, he incurs the passive title of *præceptio hæreditatis*. Under this passive title, the successor is responsible only for those debts which were contracted before the propelling of the succession. The text writers are not agreed as to the nature of this kind of representation. According to Stair,(e) it operates as an extension of the remedy of reduction

Representation *præceptione hæreditatis*, how incurred, and to what effect.

(y) *Arniston v. Ballenden*, *supra*.

(z) 1 Bell's Com. 5th ed. 786.

(a) Stair, 3, 8, 71 ; Ersk. 3, 9, 43 ; *Town of Edinburgh v. Ley*, 1664, M. 3123 ; *Kelhead v. Irving*, 1674, M. 3124 ; *Hall v. Thomson*, 1675, M. 3125.

(b) "Act anent Executry and Moveables," 1695, c. 41 : "That in the case of a moveable estate left by a defunct, and falling to his nearest of kin, who lies out and doth not confirm, . . . the creditors of the defunct, doing diligence to affect the said moveable estate, within

year and day of their debtor's decease, shall always be preferred to the diligence of the said nearest of kin." The Act applies only to intestate succession.

(c) *Tait v. Kay*, 1779, M. 8142 ; *Bell v. Campbell*, 1781, M. 3861 ; *Murray's Crs.*, 1744, Elch. "Executor," No. 13 ; *Christie v. Allan's Crs.*, 27 June 1835, 18 Sh. 999. See also Dirleton, "Executor," 92 ; 2 Bell's Com. 5th ed. 90.

(d) Bell's Com. *ut supra*.

(e) Stair, 3, 7, 1.

CHAPTER LXXI. under the Act 1621, cap. 18, to the case of gratuitous conveyances to apparent heirs; and if it were certain that the heir's responsibility is limited to the value of the estate taken, the explanation would be satisfactory. But it is not yet settled whether the responsibility is limited or unlimited; (*f*) and we are afraid there is little prospect of any immediate settlement of this interesting question, keeping in view the fact that nothing new has been added to this branch of the law of passive titles for more than a century. Erskine ascribes the title to the donee's acknowledgment of the character of heir, (*g*) and Bell indicates the difficulty without attempting to remove it. (*h*)

Illustrations.

2265. This passive title is only incurred where the donee is heir *alioquin successurus*, (*i*) and where the conveyance is proved to be gratuitous. (*k*) The responsibility is only for debts which were either made burdens on the conveyance, or were contracted before infeftment upon it. (*l*) The passive title does not exclude the remedy of reduction under the Act 1621, cap. 18, and it will generally be more for the advantage of the ancestor's creditor to proceed under the Statute than on the passive title; for, as we have seen, the latter does not confer a preference on the ancestor's creditors over those of the heir. (*m*) The heirs of a lucrative successor are liable in the same degree as the successor himself. (*n*)

Gestio pro hærede identified with passive title of apparen-
cy.

2266. II. *GESTIO PRO HÆREDE*.—Where the person entitled to succeed as heir-at-law, after the death of the ancestor, assumes the possession and administration of the estate, without entering by service or otherwise, (*o*) he is said to incur the passive title of or behaviour as heir, and is liable in a universal representation of the ancestor. *Gestio pro hærede*, obviously, is just another name for the universal representation which results from possession on the title of apparen-
cy. The following summary of points decided, abridged from Bell's Commentaries, (*p*) embraces all that is necessary to be stated respecting the liability resulting from the possession of heritage by an heir without a written title.

In what manner
the passive re-
presentation is
incurred.

2267. The passive title of *gestio pro hærede* is held to be ex-

(*f*) Bell's Pr. § 1918; *Burnet v. Nasmyth*, 1693, M. 3040; *Henderson v. Wilson*, 1717, M. 9784.

(*g*) Ersk. 3, 8, 88.

(*h*) 1 Bell's Com. 5th ed. 660.

(*i*) *Forbes v. Fullerton*, 1686, M. 9771; and cases in Morrison, pp. 9774–9775.

(*k*) *Hadden v. Haliburton*, 1676, M. 9794; *Higgins v. Maxwell*, 1678, M. 9795.

(*l*) *Henderson v. Wilson*, *supra*; Stair, 3, 7, 6; Ersk. 3, 8, 87.

(*m*) *Arniston v. Ballenden*, 1685, 2 Br. Sup. 92.

(*n*) *Henderson v. Wilson*, 1717, M. 9784.

(*o*) The facts, that an heir had made up an inventory with the view of serving *cum beneficio*, and had afterwards renounced the succession, were held insufficient to exempt from liability under this passive title in *Montgomery v. Boswell*, 20 Dec. 1841, 4 D. 332.

(*p*) 1 Bell's Com., 5th ed. 660; 6th ed. 1045.

cluded by any right in a third party taking the estate out of the ancestor's person ;(*q*) or by any singular title in the heir ;(*r*) or where the intromission may fairly be ascribed to another title than the assumption of the succession ;(*s*) or by the intromission being inconsiderable, and without suspicion of fraud ;(*t*) or where the intromitter is not apparent heir ;(*u*) or where the apparent heir does any ineffectual act, although in the character of apparent heir. (*x*) Nor will the assumption of a title of honour, or the exercise of a hereditary office, infer *gestio* ;(*y*) nor the making up a title for the mere purpose of implementing the ancestor's general conveyance. (*z*) But the heir cannot avoid liability by attributing his possession to a fictitious title, while he enjoys the benefit of the succession. Thus, if an apparent heir, after the ancestor's death, purchase the estate otherwise than at a public judicial sale, he is held to represent him universally. (*a*) And where securities affecting the ancestor's estate are settled on a near relation to whom the heir afterwards succeeds, the heir, by taking possession, incurs the passive title, and the rights and securities in question are only available to him in so far as it shall be proved that they were acquired for a valuable consideration. (*b*) Again, if the heir shall complete his title by adjudication on his own trust-bond (a mode of entry invented for the purpose of eliding universal representation), the passive title will nevertheless attach to him. (*c*) The passive title of *gestio pro hærede* is not transmissible against the heir of the gestor, and he is only under an obligation to account. (*d*) How far it transmits against his successor in the estate, we have had occasion to consider, in our observations on the passive representation of apparent heirs. (*e*)

2268. III. VITIOUS INTROMISSION.—The representation of an ancestor is, as we have seen, strictly limited ; but, in order that the executor may claim the immunity from personal responsibility, he must have the value of the succession ascertained in the manner pointed out by the law, and must confirm the succession in terms of an inventory. If an executor, or one having an opportunity of in-

By what acts representation is incurred as a vitious intromitter.

(*q*) *Farquhar v. Campbell*, 1628, M. 9654.

(*r*) See the cases on heirs taking by disposition, *supra*, section 1.

(*s*) *Reid v. Salmond*, 1667, M. 9656 ; *Dunbar v. Leslie*, 1628, M. 9681 ; *Webster v. Greig*, 1802, Hume, 436.

(*t*) *Jeffrey v. Blair*, 1789, Bell's Oct. Ca. 482. See also Ersk. 8, 8, 86.

(*u*) *Irvine v. Monimusk*, 1626, M. 9649 ; *Cunningham v. Moutray*, 1629, M. 9664. In such cases, the party is liable to account for his intromissions.

(*x*) *Jamieson v. Seaton*, 1670, 1 Br. Sup. 620 ; *Earl of Middleton v. Stanfield*, 1682, M. 9651.

(*y*) *Lord Sempill v. Hay*, 1622, M. 9706 ; *Bower v. E. Marshall*, 1682, 2 Br. Sup. 18.

(*z*) *Ayton v. Ayton*, 1784, M. 9782.

(*a*) Stat. 1695, cap. 24.

(*b*) Stat. 1695, cap. 24.

(*c*) Act of Sed., 28 Feb. 1662 ; Stat. 1695, cap. 24.

(*d*) Ersk. 8, 8, 91 ; and see *Penman v. Penman*, 1775, M. 9886.

(*e*) *Supra*, section 2.

CHAPTER LXXI. tromitting, (*f*) does so without confirmation, he is liable universally for the debts of the defunct on the passive title of vitious intromission. (*g*) Interference with the titles or papers of the deceased infers responsibility, where the papers have not been inventoried, or equivalent precautions taken. (*h*) The recovery and payment of debts without the title of executor is, clearly, vitious intromission. (*i*) Vitious intromission imports a conjunct and several liability, in the case of liability attaching to a plurality of persons; (*k*) and it may be pleaded by exception, as well as by action, to the effect of extinguishing a claim by the intromitter against the succession. (*l*) Any probable title of intromission, or circumstances removing the presumption of fraud, and affording fair grounds of scrutiny into the actual state of the succession, are held sufficient to relieve from this penal consequence. (*m*) Vitious intromission is said to be purged by confirmation as executor before action, or within a year and day from the opening of the succession; (*n*) and it is discharged by the creditors approving the proceedings, or accepting a dividend. (*o*) Actions on the ground of vitious intromission are regarded as penal proceedings, and, as such, are only transferable against heirs in *quantum lucratis*. (*p*)

(*f*) This passive title is not confined to those who have a right to the office of executors, but attaches to every intromitter, even where the estate has been confirmed by an executor-creditor. See *Montgomerie v. Boswell*, 20 Dec. 1841, 4 D. 332; *Watson v. Haliburton*, 1656, 1 Br. Sup. 453.

(*g*) Stair, 3, 9, 9; Ersk. 3, 9, 49. See cases in Morison and Elchies, voce "Vitious Intromission;" and in Br. Sup., vol. 4, pp. 874, 416, 424, 813; vol. 5, p. 838; *Cunninghame v. M'Kirdy*, 8 Feb. 1827, 5 Sh. 815.

(*h*) *Eleis v. Carse*, 1670, 2 Br. Sup. 476; *Diggles v. Stewart*, 1706, M. 9676. Also the secretly opening sealed repositories; *Scott v. Lord Belhaven*, 25 May 1821, 1 Sh. 33; or the privately removing the defunct's effects; *Campbell v. Hart*, 1755, 5 Br. Sup. 838.

(*i*) *Forbes v. Forbes*, 12 June 1823, 2 Sh. 895, N.E. 351. And see *Keir v. Bremner*, 5 March 1839, 1 D. 618; 9 May 1842, 1 Bell, 280, where the intromission was begun by a factor *loco tutoris*, and continued by the ward after he had attained majority.

(*k*) *Wilson v. Taylor*, 4 July 1865, 3 Macph. 1060.

(*l*) *Simpson v. Barr*, 14 Nov. 1854, 17 D. 38; overruling on this point *Buchanan v. Royal Bank*, 30 Nov. 1843, 5 D. 211.

(*m*) 1 Bell's Com. 5th ed. 661; *Black v. Wallace*, 1739, M. 9881; *Gardner v. Davidson*, 1802, M. 9840; *Gardner v. Stevenson*, 26 Feb. 1880, 8 Sh. 600; *Young v. Marshall*, 27 May 1831, 9 Sh. 638; *Thomson v. Miller*, 9 Dec. 1834, 13 Sh. 143; *Dudgeon v. Dudgeon's Trs.*, 9 March 1844, 6 D. 1015; *Adam v. Campbell*, 17 June 1854, 16 D. 964.

(*n*) Ersk. 3, 9, 52; Bell's Pr. § 1921; *Stevenson v. Ker*, 1663, M. 9878; *Moor v. Maxwell*, 1712, 5 Br. Sup. 85; *Bog v. Baillie*, 1680, 1 Br. Sup. 311; *Barbour v. Kelvie*, 19 Nov. 1824, 3 Sh. 299. N. E. 210.

(*o*) *French v. Muirkirk Iron Co.*, 1797, Hume, 435.

(*p*) *Cranston v. Wilkinson*, 1666, M. 10,840; *Home v. Grierson*, 1678, 3 Br. Sup. 224; *Couper v. Meek*, 1694, 4 Br. Sup. 200; *Penman v. Brown*, 1775, M. 9886, Hailes, 667.

SECTION V.

DISCUSSION OF HEIRS AND RIGHT OF RELIEF.

2269. Heirs, although universally liable to creditors, are yet responsible only in a particular order. The right of discussion does not obtain in relation to the liabilities of heirs and executors ;(q) and the creditor is entitled, as we have seen, to proceed against the heritable or moveable estates indifferently. Nor is there any discussion as between an entered heir, or a general testamentary representative, and an apparent heir of the same class.(r) But a creditor, if he resolve to proceed against heirs, must observe the rules of discussion, according to the nature of the debt. The order of discussion in the case of claims against the heritable estate, is the same as the order of liability.(s)

General rule as to order of liability and discussion of heirs.

2270. With respect to all heritable debts not specially charged upon particular estates, or directed to be paid by a particular heir, as also all debts of which the heir is entitled to relief from the executors, the rule is, that the ancestor's general disponees or trustees are primarily liable.(t) If the ancestor have left no general disposition, liability attaches to the heirs *ab intestato* taking up the succession ; the heir of line first, and after him the heir of conquest.(u) Heirs of provision are postponed to heirs at law ;(x) and according to the latest authority, heirs of different estates are liable rateably, *secundum valorem* of the estates which they respectively inherit.(y) In the discussion of heirs of different orders, the creditor must proceed to personal diligence, *i.e.*, by giving a charge on a decree, against the person primarily liable, before he can raise actions against those who are liable *subsidiarie*; or he must have proceeded effectually against the estate of the debtor.(z)

Order of liability of the different classes of heirs of the heritable estate.

2271. Where heritable debts are secured upon more than one subject, the heirs are liable rateably, and may be sued together.(a) The heir of the estate over which a debt is heritably secured is the party primarily liable, and ought to be discussed before the heir-

Liability in relation to debts heritably secured upon different estates.

(q) *Supra*, sect. 1. See *Bain v. Reeves*, 22 Jan. 1861, 23 D. 416; *Moncrieff v. Milne*, 16 July 1856, 18 D. 1286.

(r) *Morris v. Beveridge*, 28 Nov. 1867.

(s) See *Ersk.*, 8, 8, 58; *Bell's Pr.* §§ 1935-6.

(t) *Weir v. Parkhill*, 1788, M. 5857; *Mercer v. Scotland*, 1745, M. 9786; *Elch.*, "Implied Will," No. 4.

(u) *Crs. of Fairlie v. His Heirs*, 1680, M. 3559; *Brown v. Brown*, 1782, M. 5228;

Dundas v. Ogilvie, 1804, M. "Discussion," App. No. 1.

(x) *Forrester v. Fortheringhame*, 1649, 1 Br. Sup. 429; *Innes v. Sinclair*, 1778, M. 8567.

(y) *Mackenzie v. Mackenzie*, 5 Mar. 1847, 9 D. 886.

(z) *Ersk.*, 8, 8, 58; *Innes v. Sinclair*, *supra*; *Straiton v. Earl of Lauderdale*, 1708, M. 3579.

(a) *Sinclair's Exrs. v. Fraser*, 1798, Hume, 176.

CHAPTER LXXI. general(*b*) or the personal representatives.(*c*) Such, at least, is the rule where the security was in existence at the date of the ancestor's general disposition, and no intention is expressed to transfer the burden to the general representatives.(*d*) But a direction to trustees or general disponees to pay all the granter's debts, throws on the general estate the burden of debts for which heritable security is afterwards granted.(*e*) And where, in an obligation to a creditor, a particular heir is bound, that heir is primarily liable, and must be first discussed.(*f*)

Heir liable *subsidiarie* entitled to relief.

2272. Heirs who are liable only *subsidiarie*, if they pay the debt, are creditors of those primarily liable, and may seek indemnification in an action of relief. A catholic security over all the ancestor's estates, divides among the heirs taking those estates, when the succession splits; and one of the heirs paying the debt, has proportionate relief against the others.(*g*)

(*b*) *Ogilvie v. Dundas*, 22 May 1826, 2 W. & S. 214; *Robertson's Crs. v. W. Robertson's Crs.*, 1808, M. "Competition," App. No. 2.

(*c*) *Henderson v. Hamilton*, 29 Jan. 1858, 20 D. 479; *Carrick's Trs. v. Moore*, 11 June 1840, 2 D. 1068, and cases there cited.

(*d*) *Henderson v. Hamilton*, *supra*.

(*e*) *Breadalbane Trs. v. Duke of Buckingham*, 26 May 1842, 4 D. 1259, 1263.

(*f*) *Blair v. Anderson*, 1668, M. 3571.

(*g*) *Bell's Pr.* § 1936; *Rose v. Rose*, 1786, M. 5229; 2 April 1787, 8 Pat. 66.

CHAPTER LXXII.

ORDER OF LIABILITY OF THE REAL AND
PERSONAL ESTATES.

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|---|---|
| I. <i>Relief between Heirs and Personal Representatives.</i>
II. <i>Real and Personal Liabilities distinguished.</i> | III. <i>Liabilities of the different classes of Real and Personal Representatives.</i>
IV. <i>Effect of Testamentary Provisions charging or disburdening particular estates.</i> |
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SECTION I.

RELIEF BETWEEN HEIRS AND PERSONAL REPRESENTATIVES.

2273. It is a well known rule of law that, in a question between real and personal representatives, the personal estate in the hands of the ancestor's executors is the primary and appropriate fund which must be resorted to for payment of his personal debts, as is the real estate for the payment of obligations secured upon it, or which from their nature attach to the realty. This is the leading principle regulating the administration of the estate, as between the parties interested in the succession; but it does not extend to the control of the creditors of the ancestor, to whom, under the operation of the principle of passive representation, the real and personal estates are equally burdened, and who is therefore entitled to bring his action against either, without regard to the nature of the obligation. The case of *Walker v. Masson* (a) is a striking instance of the extent to which this right is carried. An action having been brought by the personal representatives of a deceased fee-simple proprietor, to have it found that an obligation, to take over farm buildings upon the expiration of a lease at a valuation, fell to be implemented, not by the executors, but by the heir in these lands, the Court, while clearly of opinion that the primary obligation lay on the heir, refused to pronounce a decree which might be held to militate against the right of the creditor in the obligation to have direct recourse against the personal representatives. If, however,

Doctrine of relief between heir and executor generally stated.

(a) *Walker v. Masson*, 18 July 1857, 19 D. 1099; cases in Mor. pp. 3562-3565.

CHAPTER LXXII. the heir elect to proceed against the heirs of the real estate, he must discuss those heirs in the order of legal liability. (b)

Origin of the right, and limits of its application.

2274. From the doctrine that the burden of the debts of the ancestor attaches to the real and personal estates according to their respective qualities, it follows that (where the question is not with a creditor, but between the real and personal representatives) the heir who pays a moveable debt, or the executor who pays an heritable debt, has relief against that part of the succession which is primarily liable. (c) The right of relief, competent to the heir against the executor in respect of the payment of personal debts, is recognised by an Act of the Scottish Parliament; (d) and, *ex parite rationis*, the right is extended in favour of the executor who has made payment of heritable debts at the suit of the creditor. (e) Whether that relief will extend to more than the value of the succession taken by the person against whom relief is sought, must depend on the nature of the representation he has incurred. (f) Where the representation is limited, the creditor's claim is measured by the value of the estate, and the relief competent to other representatives is subjected to a corresponding limitation. (g) Where an heir or executor, whose representation is limited to the value of the estate, pays a debt primarily affecting his share of the succession in full, it would seem that he has a good action against representatives or successors, who are liable in the second order, for the amount of the surplus payment.

Where real and personal estates are situated in different countries, liability regulated by law of domicile.

2275. The question, whether a debt is primarily chargeable on the real, or on the personal estate of the deceased, where these are situated in different countries, is, in its general relations, one which must be determined by the law of the domicile. Yet it would seem that, where debts are actually paid by a successor out of real estate, which, according to the *lex rei sitæ*, is not primarily chargeable therewith,

(b) See the rules of discussion stated *infra*, Sect. 8.

(c) Ersk. 8, 9, 48; Bell's Prin., § 1936.

(d) Statute 1503, cap. 76, entitled "The heretoures and aires may be followed at the zeiris end after the decease of their forebears: caution suld be found be the executors to the aire."—"And gif it pleasis the aire, he may and suld be diligent, and require the Ordinar within the said zeir, to aske compt, and he to see the compt, and quhat beis founden remanent, oyer the things pertainand to their office, that he suld require the Ordinar that he micht have caution and souertie for the relieving

of his heretage, in sa far as the gudes restis attour the compt."

(e) Ersk. *ut supra*, citing *Falconer v. Blair*, 1629, M. 12,487, and cases in M. voce "Heir and Executor—Mutual relief," pp. 5203–5229.

(f) On this point see chapter 71 (Passive Representation).

(g) *Renton v. Renton*, 14 Nov. 1851, 14 D. 35, where an executrix was held not to be liable in relief beyond the amount of the executry, notwithstanding that the deficiency in the executry-funds was caused by the expense of proceedings to determine whether the debts in question were debts primarily affecting the heir or the executor.

the payment is held to be made under reservation of the right of relief, which in this case is truly the counterpart of the obligation to pay.^(h) On this principle, it was held by Lord Langdale, M.-R., that an heir, succeeding to the estate in Scotland of a person who died domiciled in England, who had been compelled to pay certain bond debts out of the produce of the Scotch estate, had a good action against the personal representatives in England, founded upon the right of relief which the law of Scotland gives to an heir who is compelled to pay moveable debts.⁽ⁱ⁾ The converse of this case occurred in *Drummond v. Drummond*.^(k) An heir to an heritable estate in Scotland was also one of the personal representatives, and in that character took out letters of administration to the personal estate in England; and he, being sued in England by the other next of kin for their shares of the succession, was held entitled to deduct the value of an heritable debt affecting the estate in Scotland, on the ground that mortgages were by the law of England charged upon the personal estate.^(l) But the next of kin, founding upon the decision of the Court of Administration in England, under which they had been compelled to bear the burden of an heritable debt, raised an action of relief against the heir in the Court of Session; and, on appeal to the House of Lords, their claim was sustained; and it was held that the foreign decree was not *res judicata*, and did not affect the question of the relief competent to the executors against the heir under the law of Scotland. So also, in relation to personal debts contracted in England—where, prior to the passing of a recent Statute,^(m) the heir was not liable for simple contract debts—it was held by the House of Lords that this was not a property of the debt, which could be extended so as to exempt real estate in other countries; and that the heir succeeding to heritable estate in Scotland was therefore liable under the doctrine of passive representation.⁽ⁿ⁾

2276. The right of relief against the personal estate, competent to an heir or disponent in relation to debts for which he is only liable *secundo ordine*, is qualified by the implied condition that such relief shall not prejudice any of the creditors, or any other party

Right of relief cannot be exercised to the prejudice of creditors or legatees.

^(h) The question, whether a debt secured on real estate is thereby made chargeable against it, in a question between the heir and the personal representatives, falls to be determined by the local law of the country where the estate is situated; *Fraser v. Spalding*, 20 July 1812, 5 Pat. 642.

⁽ⁱ⁾ *Winchelsea v. Garety*, 2 Keen, 293.

^(k) *Drummond v. Drummond*, 20 Feb. 1799, 4 Pat. 66.

^(l) Under the Act 17 & 18 Vict., cap. 113, usually known as Locke King's Act, the heir or devisee of real estate is no longer entitled to claim payment of mortgage debts out of the personal estates.

^(m) The real estate is now liable, whether it is in the hands of an heir or devisee; 3 & 4 Will. IV., cap. 104.

⁽ⁿ⁾ *Fullarton v. Kinloch*, 1789, M. 4456.

CHAPTER LXXII. having an equal, or a more favoured claim upon the personal estate than such heir or donee. It is clear that an executor, sued by the heir for relief of personal debts, would have a good defence on the exception, that the inventory was exhausted by debts which he had paid, or was in the course of paying under a due administration.^(o) Further, it appears that the heir, or donee of the heritable estate, cannot insist on being relieved out of the personal estate to the prejudice of a general or special legatee. In the case of specific legacies, the nature of the gift, as having relation to a definite subject, sufficiently manifests the intention of the ancestor that it should be enjoyed free from debts, or other burdens affecting the general estate. Accordingly it is a settled rule, that specific legacies do not suffer abatement until the general estate, both heritable and moveable, is exhausted.^(p)

Principle on which right of relief postponed to claims of legatees.

2277. A demonstrative legacy, that is, a legacy secured on a particular fund, is entitled to the privileges of a specific legacy in regard to exemption from liability to abatement, until the general funds have been exhausted.^(q) But it is not, at first sight, apparent that the right of relief of the heir or donee ought to be postponed to the claims of *general* legatees. It must be observed that the question is not truly one of preference of legacies to debts, but a question of preference between claimants under legacies of quantity and claimants of the residue. On this consideration, the decision in *Bain v. Reeves* ^(r) may be cited, as a precedent in favour of the preferable right of the general legatees. A truster directed his trustees to pay all his debts and certain pecuniary legacies out of his general estate, which consisted of personalty; and to convey his heritable property to the same person to whom the general residue was destined. The personal estate having proved insufficient for the payment of debts and legacies, it was maintained by the donee that the debts must be paid in the first instance out of the personal estate, and that he was entitled to take the heritable estate unburdened. But, as the effect of this would have been to relieve the heritage at the expense of the general legatees, the claim was repelled, and the legacies were directed to be paid in full.^(s) On similar principles, it may justly be considered that the

^(o) Ersk. 8, 9, 47.

^(p) *Greig v. Greig*, 6 June 1854, 16 D. 899. See observations of Lord President M'Neill, p. 908.

^(q) *Denistoun v. Denistoun*, 12 Dec. 1821, 1 Sh. 206, N.E. 195. The doctrine here asserted has been even more unequivocally recognised in the practice of the Court of

Chancery. See *Roberts v. Pocock*, 4 Ves. 150; *Lambert v. Lambert*, 11 Ves. 607.

^(r) *Bain v. Reeves*, 29 Jan. 1861, 28 D. 416; and see *Fergus v. Fergus*, 7 Feb. 1833, 11 Sh. 362.

^(s) The doctrine, that the equity to have the personal estate applied to the exoneration or relief of the real, subsists only be-

right of relief competent to an executor paying an heritable debt, CHAPTER LXXII. ought not to extend beyond the measure of the value of the free heritable estate, deducting legacies specially charged upon it, as well as debts; but this question does not appear to have yet arisen for decision.

2278. Questions of relief between heirs and personal representatives not unfrequently arise even in cases where the residue of the succession, in both branches, is destined to the same person, or is vested in the same body of trustees. Where, from any cause, the residuary destination, or, it may be, the destination of a share of the residuary estate, happens to fail, and the property thereby devolves as lapsed succession, in its natural character, to the truster's heirs and executors, these parties have a reciprocal interest in insisting that debts and preferable claims should be satisfied out of those portions of the estate on which they are respectively chargeable. The like interest arises, where a beneficiary under a trust-settlement dies intestate before payment or conveyance in his favour. The mere fact of a trustee, or judicial factor on the estate of a person under curatory, having for convenience paid debts out of a particular fund, will not alter the incidence of these debts, in a question between heirs and personal representatives. Accordingly, in the adjustment of the interests of these parties in the succession, those debts only are to be charged against the respective estates, for which liability would attach to them by operation of law, in the case of intestacy.^(t) And so, where heritable estate has been sold by trustees for the payment of personal debts, in the belief that the personal estate was insufficient, any accession subsequently accruing to the personal estate is applicable, in the first instance, to the reimbursement of the heritable estate.^(u)

Right of relief, how affected by testamentary directions.

SECTION II.

REAL AND PERSONAL LIABILITIES DISTINGUISHED.

2279. In order to the complete elucidation of the general rule, stated in the commencement of the chapter, that the personal es-

Classification of liabilities affecting real and personal estates.

tween the heir or devisee and the residuary legatee, and not against specific or general legatees, is recognised in the law of England. See Williams on Executors, 6th ed. 1567: "The heir or devisee shall not stand in the place of the mortgagee against the personal estates, if by so doing he would disappoint any creditor, or any legatee ex-

cept the residuary legatee;" *Hamilton v. Worley*, 2 Ves. jun. 65, and cases cited in Williams, *ut supra*.

(t) *Moncrieff v. Milne*, 16 July 1856, 8 D. 1287.

(u) *Stainton's Trs. v. Topham*, 10 Jan. 1868 (2d Division).

CHAPTER LXXII. **tate** is the primary fund for the payment of unsecured obligations, as the real estate is for the payment of obligations secured on heritage or attached to it, it is necessary that we should consider the quality of such debts and obligations as are of an ambiguous or exceptional character. For the purposes of this inquiry, the liabilities affecting a succession may be classed under three heads, viz.—1st, Personal Debts; 2d, Heritable Debts; and 3d, Legacies and Provisions.

Contracts, debts, and unsecured obligations primarily chargeable against personal estate.

2280. I. PERSONAL DEBTS.—With regard to ordinary contract debts, whether constituted by decree or resting *in obligatione*,—including claims of compensation for unfulfilled obligations, guarantees, (x) etc.,—no difficulty can arise. These, from their nature, are primarily chargeable upon the personal estate. And where an ancestor had purchased an estate, and, in lieu of payment of the price, became bound to pay all the seller's debts, many of which were heritably secured (he having been previously bound by bond along with the seller for these debts), it was held by Lord Loughborough in the House of Lords, that the obligation was moveable in its nature, and that the heir was not primarily liable in fulfilment of it, by reason of its connection with a purchase of heritable estate. (y) Under the general designation of personal debts, marriage-contract provisions are included, where these are not made real by being secured on the heritable estate, or made payable out of it. And we have seen, in one of the preceding chapters, (z) that a marriage-contract provision has so much the property of a debt that it is not subject to ademption by reason of a testamentary provision being subsequently given, unless the latter is expressly declared to be in satisfaction of the former.

Price of heritable estate under an uncompleted sale is a personal liability.

2281. The price of heritable estate, due under an uncompleted contract of sale, is a burden upon the personal estate, because it is a money obligation, and because it is presumed that the ancestor would have paid the price out of his personal funds. (a) And where real estate is purchased by the ancestor on the footing that the price is to be paid in full, and heritable debts affecting the property to be discharged, the executors of the purchaser are not entitled to relief, even to the extent of those debts, on the ground that they are actually secured on the estate at the opening of the succession. The result is precisely the same where a part of the price is retained

(x) As to which, see *British Linen Co. v. Monteath*, 12 Feb. 1858, 20 D. 557.

(y) *Lothian v. Ross*, 15 Dec. 1797, 8 Pat. 621.

(z) Chapter 25, section 2 (Satisfaction of Provisions by Legacies).

(a) *Arbuthnott v. Arbuthnott*, 1773, M. 5225; *Clayton v. Lothian*, 2 W. & S. 50, per Lord Gifford; and see opinions in *Murray v. Murray*, 16 Sh. 288.

by agreement, to discharge incumbrances which are intended to be immediately paid off.(b) But in the case of a partial retention of the price to meet a temporary annual charge on the estate, such as terce—if the charge is constituted a real burden by the disposition to the purchaser—the periodical payments fall to be made by the heir succeeding to the estate; though (as it should seem) the outstanding part of the price would be a debt of the executry.(c) Where heritable property was purchased, and the title was taken in the name of a creditor who advanced a portion of the price and undertook to reconvey the estate or account for its value on being relieved of his engagements, it was considered that, as the real nature of the transaction was the creation of an heritable security in the form of an *ex facie* absolute disposition, the obligation to account fell to be fulfilled, not by the creditor's executor, but by the heir succeeding to the estate.(d) A bond of corroboration for unpaid purchase-money, of course, makes the debt heritable.(e)

2282. It would seem that premonition given by the debtor in an heritable bond to the creditor, under the powers of the bond, amounts to a constructive discharge of the heritable estate from the obligation, in a question between the heir of the debtor and his executors. This proposition is virtually established by the case of the *Earl of Minto v. Elliot*,(f) but as, in Lord Gifford's judgment in the ultimate decision, some stress was laid on the fact that the deceased proprietor *had set apart a special fund* for the payment of the heritable creditor, the case cannot be held conclusive in reference to the convertive effect of a simple premonition, apart from the consideration of circumstances showing an intention to discharge.

Premonition to debtor in heritable bond discharges heritable estate in question with executors.

2283. Arrears of feu-duties are a burden on the executor of the vassal in a question with his heir.(g) So also are arrears of rent due in respect of the occupation of an unproductive subject, as a dwelling-house.(h) And where a creditor entered into possession of the tenant's right in a farm, with a view to realise out of the profits the value of a debt due to him by the tenant, it was held

Arrears of rents and feu-duties. Interest in partnership estates.

(b) *M'Nicol v. M'Nicol*, 16 June 1814, F.C.; and see *Arbuthnott v. Arbuthnott*, *supra*, where the estate was purchased at a judicial sale. 1824, 3 Sh. 272, N. E. 191; 3 March 1826, 2 W. & S. 40, where this circumstance was held to distinguish the case from *Arbuthnott v. Arbuthnott*, *supra*.

(c) *Carrick's Trs. v. Moore*, 11 June 1840, 2 D. 1068; *M'Nicol v. M'Nicol*, 81 Jan. 1816, F.C.; *Mead v. Anderson*, 16 Nov. 1830, 4 W. & S. 328, affirming 6 Sh. 1034. (f) *Earl of Minto v. Elliot*, 4 Feb. 1823, 2 Sh. 180, N. E. 161; 29 June 1825, 1 W. & S. 678.

(d) *Murray v. Murray*, 21 Dec. 1837, 16 Sh. 283. (g) *Johnston v. Cochran*, 13 Jan. 1829, 7 Sh. 226.

(e) *Clayton v. Lothian's Ex.*, 12 Nov. 1811, Hume, 178. (h) *Kinloch's Exrs. v. Kinloch*, 1811, Hume, 178.

CHAPTER LXXII. that he had rendered himself liable for the rent, and that the arrears thereof were a debt primarily chargeable against his executors.⁽ⁱ⁾ From the opinions expressed in this case, as well as on a consideration of the nature of the beneficial interest in partnership estate, it would appear that the rent of heritable subjects occupied for the purposes of business would fall to be paid by the personal representatives out of the profits of the business. Nor, even in the case of an agricultural or mineral lease, does there seem to be any sufficient reason for exempting the executors, who succeed to the profits accrued for the past occupation, from liability for the arrears of rent effecting to it.

Obligations accruing to heritable estate: whether quality of creditor's right is a criterion of debtor's liability.

2284. Concerning obligations whereof the benefit accrues to the heritable estate, we hesitate to lay down any positive rule until this department of the law shall have received further elucidation. In the absence of any authoritative statement of the law, it appears to us that the best criterion of liability on the part of the representatives of the debtor is that derived from the consideration of the quality of the right, in a question as to the creditor's succession. This may be illustrated by contrasting the two cases of obligations incurred by landlords to tenants, and obligations incurred to contractors for executing improvements undertaken by the proprietor himself. Where a lease provides for payment of a sum to the tenant as compensation for meliorations, or for the resumption of possession by the landlord, the obligation is clearly accessory to the tenant's right; and the benefit of it will accrue to his heir in conformity with the principle elsewhere explained.^(k) Such obligations may therefore be regarded as heritable for all purposes.^(l) But where a proprietor contracted for the erection of buildings, and the contractor had not received payment in the proprietor's lifetime, this, being an obligation the benefit of which would accrue to the personal representatives of the creditor, was held, by parity of reason, to be an obligation prestable by the personal representatives of the debtor, notwithstanding that the benefit of the improvements would enure to his heir-at-law.^(m)

⁽ⁱ⁾ *Cranstoun v. Scott*, 1814, Hume, 192.

^(k) Chapter 10, sect. 2. (Rights of Heir and Executor).

^(l) Opinions in *Walker v. Masson*, 18 July 1857, 19 D. 1099. And see the following cases in relation to heirs of entail, where the exemption from liability was rested on the ground that the heir did not represent his immediate predecessor; *Moncrieff v. Tod and Skene*, 14 Jan. 1823, 2 Sh. 118, N. E. 104; 27 May 1825, 1 W. & S.

217; *Fraser v. Fraser*, 29 Jan. 1830, 8 Sh. 409; 25 Feb. 1831, 5 W. & S. 69. The question does not appear to have been raised, whether such an obligation, as being heritable in its nature, would not attach to the heir or disponee of other unentailed heritable estate inherited from the same ancestor.

^(m) *Robson v. M'Nish*, 2 Feb. 1861, 2 D. 429, and cases cited in Lord Ardmillan's note, 431.

2285. The principle enunciated in the preceding paragraph must, we apprehend, regulate the liability of heirs and personal representatives in relation to debts, for the security or payment of which the ancestor has granted a trust of lands. Where creditors are infeft in their own names, or through the intervention of a trustee holding specially for those creditors, the obligation would appear to attach to the heritable estate. Where the estate is conveyed under a trust for sale and application of the proceeds, the creditors have no real right; and, in the event of the death of the truster before the property is sold, his personal representatives have no relief against the trust-estate.⁽ⁿ⁾

CHAPTER LXXII.

Debts secured by trust of landed estate.

2286. II. HERITABLE DEBTS.—In treating of personal debts, we have already drawn attention to the more important distinctions in relation to their quality as heritable or moveable *quoad debitorem*. The class of debts heritable includes, as we have seen, not only proper securities constituted by infeftment, but also debts declared to be real burdens,^(o) debts secured through the medium of a trust,^(p) claims for meliorations, and penalties stipulated for resumption of possession by a proprietor, or for failure to renew the lease.^(q) We have seen, also, that debts made heritable according to the law of Scotland, by being secured on heritable property, are payable by the heir without relief, notwithstanding that such debts, by the law of the domicile, are primarily chargeable against the personal estate.^(r) Some special cases, however, remain to be noticed.

Liabilities of heritable estate as comprehending proper heritable securities, real burdens, trusts, penalties, etc.

2287. Debts due by the ancestor to the heir are held to be extinguished by the act of succession, and such debts accordingly cannot be kept up by assignation.^(s) Again, it may happen that the heir has undertaken a joint liability with the ancestor in a personal obligation; and, in such cases, the circumstance that the heir

Specialty in the case of debts due by the ancestor to the heir.

⁽ⁿ⁾ The authorities in relation to the quality of debts secured by trust-disposition are stated in chap. 10, sect. 2 (Rights of Heirs and Executors). It has been held that an assignation, granted by an heir of entail of his life-interest in the entailed estate, in trust for the purpose of applying the rents in payment of debts, and, *inter alia*, of a bill debt for £516 (which was not paid off at his death), had not the effect of relieving the truster's executors from the debt; *Massie's Trs. v. Massie*, 1816, Hume, 193.

^(o) *Supra*, § 2280. But on the question how a debt may be made real without infeftment, reference must again be made to

the previous exposition of rights of heirs and executors (chapter 10). In this class of cases the quality of the obligation appears to be the criterion for determining as well the liabilities of the debtor's representatives as the rights of succession of the representatives of the creditor.

^(p) *Supra*, § 2281.

^(q) *Ibid*; *Kinloch v. Kinloch's Exrs.*, 1811, Hume, 178.

^(r) *Fraser v. Spalding*, 20 July 1812, 5 Pat. 642.

^(s) *Wrights v. Smith*, 1716, M. 5209; *Sir W. Forbes & Co. v. Lord Duncan*, 1802, M. "Tailzie," App. No. 10. See chapter 25, sect. 3 (Satisfaction of Debts by Legacies).

CHAPTER LXIII. represents the ancestor, makes no difference in their reciprocal obligations. If the obligation was for the benefit of both, the personal representatives of the defunct will continue to be jointly liable along with the heir; if the ancestor's obligation was incurred for the benefit of the heir, or was in the nature of a cautionary obligation or guarantee on his account, the executor will be entitled to total relief. (t)

Where obligation accessory to real estate, the heir is primarily liable.

2288. Obligations accessory to conveyances of real estate—e.g., an obligation of warrandice of teinds in a disposition of heritage—are primarily binding upon the heir; and the executors have relief against him. (u) The liability would appear to be the same in relation to obligations to relieve a disponee of augmentations of minister's stipend, or other public burdens. (x) The creditor's right in such contracts passes with the lands; and the superior's obligation, which is truly the counterpart of the obligation to pay feu-duty, is primarily incumbent upon his successor in the superiority.

Annuities and rights *futuri temporis* are heritable in relation to the debtor's liability.

2289. Rights having *tractum futuri temporis*, as liferent provisions and annuities, being heritable in their own nature, are burdens upon the real estate. Such rights have from an early period been adjudged to be heritable in relation to diligence, (y) and in relation to the succession of assignees. (z) In more recent cases, annuities not specially charged on heritable estate have been held to be primarily payable by heirs and disponees, in a question with the personal representatives. (a)

Provisions charged on heritable estate are debts primarily affecting the heir.

2290. Family provisions, when charged upon, or directed to be paid out of, the heritable estate, are burdens primarily affecting the heir; and where the obligation is laid upon the proprietor and the heirs of the investiture, if the debt be not paid by the heir immediately succeeding to the granter, it will, by the terms of the grant, devolve upon remoter heirs taking the estate in virtue of the destination. Nor can such heirs evade the obligation by passing over the granter's immediate heir or disponee, and making up a title by service to the granter himself, or to a remoter ancestor. (b) Thus, where an heir of entail, in the exercise of the powers conferred

(t) *Hughson v. Hughson*, 17 May 1822, 1 Sh. 415, N. E. 388.

(u) *Carmichael v. Anstruther*, 22 May 1821, 1 Sh. 25, N. E. 24. See *Anstruther v. Lockhart*, 26 June 1827, Sh. (Teind Ca.) 183.

(x) With reference to liability under such obligations, see *Duke of Montrose v. Stewart*, 15 Feb. 1860, 22 D. 755; 27 March 1863, 1 Macph. (Ap. Ca.) 25, and cases there cited.

(y) *Clunie's Crs. v. Sinclair*, 1739, M. 713.

(z) *Ewing v. Drummond*, 1752, M. 5476.

(a) *Crawford's Trs. v. Crawford*, 11 Jan. 1867, 5 Macph. 275; *Wallace v. Ritchie's Trs.*, 7 July 1846, 8 D. 1038. See *Robertson v. Baillie*, 1705, M. 3498, 5478; *Jardine v. Lockhart*, 14 June 1883, 11 Sh. 720.

(b) *Thorburn v. Thorburn*, 18 March 1858, 20 D. 829.

upon him by the entail, bound and obliged himself, and his heirs succeeding him in the entailed estates, to pay certain provisions to his younger children,—and the heir next succeeding possessed the estates, and paid interest on the provisions, but did not pay the principal,—it was held that the provisions were payable by a subsequent heir of entail who did not represent the heir to whom the liability first attached; and *that* without relief against the executors of the latter.(c)

2291. If an heir of entail pays off bonds of provision secured upon the estate under the powers of the entail, and takes assignments to the debts, it is settled law that he is entitled to maintain and transmit them as debts against the succeeding heir of entail; and that they are not extinguished *confusione*.(d) Where an entailor, by deed, made his personal debts a burden upon the entailed estate, and afterwards bequeathed his executry-estate to the heirs of entail in the order of the tailzied succession, it was held that the institute was entitled to keep up the debts against the entailed estate, and that they were not extinguished by payment.(e) But, in a case of succession under a simple destination, it was held that the payment of debts by a person who was both heir and executor operated an extinction of the liability; and that his personal representatives could not, in virtue of assignments taken in favour of the ancestor and his assignees, recover payment from an heir-male who afterwards succeeded to the estate.(f)

In what cases such debts may be kept up by assignation.

2292. III. LEGACIES AND PROVISIONS.—Pecuniary legacies, when given generally, without specification of a particular fund for their payment, are primarily chargeable upon the personal estate; and this liability, as we shall see,(g) is not altered by a declaration that the real estate shall be a fund for payment of legacies; such declarations being understood to be intended only for the greater security of the legatee in the event of the personal funds proving insufficient. There is, however, a very material distinction between debts and legacies in respect of the liability of the personal estate; the former being due *ex lege*; the latter only in virtue of the words of the testamentary provision, which create the obligation without laying it upon any particular fund.

Measure of liability of the personal and general estates for legacies and gratuitous provisions.

2293. In the case, therefore, of a demonstrative legacy—which is not given generally, but only out of a particular fund—it is held, in the law of England, that the legatee has recourse only against

Demonstrative legacy, whether payable out of the general estate on failure of the specified fund.

(c) *Lord Macdonald v. Macdonald*, 18 April 1835, 1 S. & M.L. 341.

(d) *Crawford v. Hotchkis*, 11 March 1809, F.C.

(e) *Fraser v. Lord Lovat*, 22 Feb. 1854, 16 D. 645.

(f) *Codrington v. Johnston*, 31 March 1824, 2 Sh. (Ap. Ca.) 118.

(g) *Infra*, § 2295.

CHAPTER LXXII. the specified fund. *(h)* This rule of construction appears to be well founded, and to be deserving of adoption by the Courts of Scotland. It is, in fact, the principle of the decision of the second point in the case of *Moncrieff v. Skene*, *(i)* where a legacy was given, payable by an heir in case of his succeeding to a certain estate; and the heir not having succeeded, the legacy was held not to be exigible. *(k)* There is an early decision of a contrary tendency. A testator left a legacy of £1000, to be paid out of a sum due to him, which was heritably secured, and which therefore could not be burdened by testament; the Lords found that, albeit the legacy could not receive effect by payment out of that sum particularly, yet, nevertheless, that the legacy remained good to affect the defunct's other moveables with payment thereof, if he had as many as might satisfy the same. *(l)* This decision would probably not now be followed as a precedent. On the whole, it may be affirmed, in the case of a proper legacy of heritage or other demonstrative legacy, that the general personal estate is not liable *secundo ordine* in the event of the failure or exhaustion of the subject out of which the provision is payable.

Liability for specific legacy is limited to the specific fund.

2294. A specific legacy imports no obligation upon the general estate. If the subject perishes or is assigned in the lifetime of the testator, the legacy is held to be extinguished. *(m)* But where a testator by will provided a specific fund for payment of an annuity, and also bound himself to pay to a trustee "such sum as may be necessary to provide and secure such annuity," it was held that the general estate remained bound upon failure of the fund so set apart. *(n)* A provision to a widow in lieu of aliment is a charge on the heritable estate.

No subsidiary liability for legacies except under terms of express testamentary provision.

2295. Legacies are still farther distinguished from debts in relation to the liability attaching to representatives *secundo ordine*. Debts and obligatory provisions bind the whole succession, although in a question *inter se* the liability of the representatives will depend on the quality of the obligation. But legacies never can be claimed from the heir or disponee of the real estate unless they are expressly made chargeable upon it. *(o)* What amounts to

(h) Williams on Executors, 6th ed., 1581, where the authorities are cited.

(i) *Moncrieff v. Skene*, 29 June 1825, 1 W. & S. 672.

(k) See also *Govan v. Seton*, 28 Jan. 1812, F.C.

(l) *Drummond v. Drummond*, 1624, M. 2261 and 13,300.

(m) See cases on the ademption of spe-

cific legacies, chapter 22 (Legacies and Residue).

(n) *Bell v. Brodie*, 16 Feb. 1847, 9 D. 712.

(o) *Craig v. Lindsay*, 1762, M. 15,944; *Govan v. Seton*, 28 Jan. 1812, F.C.; *Hamilton v. Bennet*, 16 August 1833, 6 W. & S. 533, affirming 10 Sh. 830. Here the ancestor's whole estate was conveyed by deed

an effectual charge is a question involving two elements ; the one of conveyancing, the other of intention. In the first place, it must be observed, that the general heritable estate in Scotland cannot be burdened except by words of express disposition, or by making the burden a condition of a dispositive conveyance. But the rule of law which prevents the heritable estate from being diminished except by a dispositive conveyance is held to be satisfied by the execution of a settlement in favour of the heir or of trustees, containing a reserved power to subject the estate to payment of legacies ; insomuch that legacies bequeathed by any subsequent writing, however informal, are thereby made burdens on the estate conveyed.^(p) A legacy of heritage constituted by testament may also be binding upon the heir in virtue of the law of approbate and reprobate, *i.e.*, where the heir elects to take benefit under the testament.^(q)

2296. As regards the element of intention (without which the real estate cannot in the general case be charged with the payment of testamentary provisions), the case of annuities may be considered as exceptional. In the ordinary case of debts and legacies being made a first charge upon the general estate conveyed under a trust-settlement, the order of legal liability of the real and personal estates remains unchanged ; and therefore, if the residuary interest lapses, the heir is entitled to insist that the personal estate should be exhausted before recourse is had to the heritable.^(r) But annuities being from their quality primarily chargeable on the real estate,^(s) it follows, by parity of reasoning, that such provisions, if made payable out of a general residue, are burdens on the heritable estate, whether in a question between the heirs and executors of the testator, or between those of the residuary legatee.^(t) But where by will, codicil, or other testamentary writing *not* forming part of a settlement *of heritage*, an annuity is given generally, without reference to any particular fund, it must be held to be given out of the personal estate ; for the testator is presumed to know that his heritable estate was not effectually charged by such an instrument, and a bequest in these terms raises an implied trust on the

Specialty in the case of annuities and rights having *tractus futuri temporis*.

of settlement to trustees for certain uses and purposes, which included the payment of legacies therein mentioned. By a subsequent deed the testator directed certain lands to be sold, and the proceeds to be applied in payment of those legacies ; and the residue of his estate he directed to be entailed. The subjects directed to be sold being exhausted by debts, it was held that the residuary estate was liable for payment of the general legacies, in respect that it

was conveyed generally, subject to the purposes of the trust.

^(p) *Willock v. Auchterlony*, 1769, M. 5539 ; *Brack v. Hogg*, 25 Feb. 1831, 5 W. & S. 61.

^(q) See *Dundas v. Dundas*, 22 Dec. 1830, 4 W. & S. 460.

^(r) *Bowie v. Bowie*, 1811, Hume, 765.

^(s) See § 2289, *supra*.

^(t) *Wallace v. Ritchie's Trs.*, 7 July 1846, 8 D. 1038.

CHAPTER LXXII. part of the executor to set apart a capital sum sufficient to provide for the annual payments.(u)

SECTION III.

LIABILITY OF THE DIFFERENT CLASSES OF REAL AND PERSONAL REPRESENTATIVES.

Where estates descend to different heirs, each is primarily liable for debts specially secured or charged upon it.

2297. Where an ancestor's estate falls to be administered according to the rules of law, either as intestate succession or under a settlement in which no special directions are given with respect to the incidence of its liabilities, the question, whether the real or personal estate is primarily liable for the payment of any particular debt or provision, depends on the quality of the obligation, or of the property on which it is secured. The quality of the ancestor's debts and provisions of different descriptions is discussed in the preceding section with reference to the order of liability of the real and personal estates, considered as two undivided successions. But it frequently happens that the heritable estates of the ancestor (where there are more than one) descend after his death to different heirs, either in virtue of the destinations of the investitures or under settlements. In like manner, there may arise a division of the personal estate; the funds of the testator in one country, for example, descending to his legal representatives according to the law of the domicile; other funds being destined to a legatee, or it may be to a plurality of legatees of different denominations. Hence it becomes necessary to consider the respective liabilities of the different heirs in heritage for debts affecting the heritage, and those of the heirs *in mobilibus* with respect to personal debts. With respect to both classes of heirs, it may be asserted as a universal proposition that, wherever a debt is secured upon a particular subject, the person taking that subject is liable *in valorem* without relief, whether in a question with heirs(v) or with general representatives.(x) This result is implied in the nature of the right in the case of an heritable security, by which in effect the ancestor is immediately divested of so much of the estate as is necessary to satisfy the debt. Nothing, therefore, vests in the heir but the reversionary interest. With respect to moveable succession, we refer to a previous chapter as to the ademption of specific legacies by alienation or diminution in the testator's lifetime.(y) Where a debt is se-

(u) *Young v. Martin*, 6 Feb. 1868 (1st Division).

(v) *Stair*, 3, 5, 17; *Ersk.*, 3, 8, 52; *Ogilvie v. Dundas*, 22 May 1826, 2 W. & S. 214; reversing M. "Discussion," Appx. No. 1;

Robertson's Crs. v. W. Robertson's Crs., 1803. M. "Competition," App. No. 2.

(x) *Carrick's Trs. v. Moore*, 11 Jan. 1840. 2 D. 1068, and cases there cited.

(y) Chap. 22 (Legacies and Residue).

cured on different subjects, the heirs or beneficiaries are liable in proportion to their respective values. (z) Subject to these general observations, the order of liability of the respective estates as between heirs of the same denomination is as follows. CHAPTER LXXII.

2298. With respect to the liability of heirs in heritage for debts, the leading rule is, that the general disponee is primarily liable for all heritable debts not specially charged on other heirs; (a) and, after him, the heir of line. (b) Creditors taking proceedings against heirs must discuss them in their order; (c) calling, in the first place, the general disponee, and next the heir of line. After the exhaustion of the general estate, heirs of conquest and provision are liable in their order. (d) Among heirs of provision the liability is understood to attach primarily to the heir-male, or heir by any general character; the heir of marriage (having right rather by obligation than by succession) being taken last. (e) The creditor's acceptance of a bond of corroboration from the heir of line does not liberate the other heirs and representatives from their contingent liability. (f) By discussion is meant the use of personal diligence upon a decree, and also the adjudication of any heritable estate belonging to the heir against whom proceedings are taken. (g) An heir by a general character, if he does not get the estate, has relief against the heir of provision for debts which he has paid under distress. (h) Order of liability of the different classes of heirs in heritage.

2299. With respect to the order of liability of personal representatives for debts, the discussion is simplified by the consideration that the claim of the creditor lies against the executor, whose duty it is to see that the payments made by him are charged against the legatees in the order of legal liability. (i) Universal or residuary legatees are, of course, primarily liable in a question with general Order of liability of personal representatives and heirs in mobilibus.

(z) *Rose v. Rose*, 2 April 1787, 3 Pat. 66; *Sinclair's Exrs. v. Fraser*, 1798, Hume, 176; *Moncrieff v. Skene*, 29 June 1825, 1 W. & S. 672.

(a) *Weir v. Parkhill*, 1738, M. 5857; *Mercer v. Scotland*, 1745, M. 9786, Elch. "Implied Will," No. 4. Where estate is disposed generally to a plurality of persons, the liability will be divisible *pro rata*. The same rule obtains in relation to the liability of heirs-portioners; *White v. White*, 1673, M. 5207; or of heirs-general, where there are more than one; *Ker v. Thomson*, 1786, M. 5211; Elch. "Succession," No. 3.

(b) *Innes v. Sinclair*, 1773, M. 3567.

(c) *Innes v. Sinclair*, *supra*, and cases cited in the subsequent notes to this paragraph.

(d) *Brown v. Brown*, 1782, M. 5228; *Forrester v. Fotheringham*, 1649, 1 Br. Sup. 429; *Walls v. Maxwell*, 1700, M. 3561; *Burnett v. Burnett*, 4 March 1854, 16 D. 780.

(e) Bell's Prin., § 1935.

(f) *Stewart v. Campbell*, 6 Feb. 1852, 14 D. 443.

(g) Ersk. 8, 8, 53; Bell's Prin., § 1935; *Straiton v. Earl of Lauderdale*, 1708, M. 3579; *Innes v. Sinclair*, 1773, M. 3567.

(h) *Maxwell v. Houston*, 1717, M. 5210, as reversed in H. L.

(i) In the case of an executor having improperly, or in ignorance of the existence of debts, paid over the estate to legatees or personal representatives, it cannot be doubted that the creditor is entitled to follow the estate into the hands of

CHAPTER LXXII. of special legatees; for there can be no residue until testamentary provisions, as well as debts, are paid off. A bequest of all the testator's property in a particular country, or of a particular description, is a general legacy of that kind which has been named demonstrative; and the legatees of such bequests would seem to be only liable for the testator's debts in the event of the other testamentary funds proving insufficient. Should there be no residue, and should the estate be insufficient for the payment of both debts and legacies, the general legacies will suffer abatement in proportion to their respective values; and, on the exhaustion of the general funds, the creditor will have recourse ultimately against funds specifically bequeathed.

Liferenters and annuitants, how affected by debts charged upon the subject of the annuity.

2300. Where a legacy or residuary interest in personal estate is given to one person in liferent and to another in fee, it is understood that all debts and burdens affecting the subject of the bequest are held to be deducted from the capital; and that the liferent bequest is limited to the clear annual profits of the fund.^(k) But where an annuity for life is given, consisting of the interest of a fixed sum, and such annuity is also made payable out of a special fund, the annuitant is entitled to payment in full without any deduction in respect of debts; and may even require the capital of the fund to be sunk, if this is necessary to produce an annuity equal to the interest of the specified sum.^(l)

SECTION IV.

EFFECT OF TESTAMENTARY PROVISIONS CHARGING OR DISBURDENING PARTICULAR ESTATES.

Disposition of heritable estate subject to the payment of debts does not exonerate the personal estate of its primary liability.

2301. It frequently happens that an ancestor possessed of real and personal estate has disposed his heritable estate subject to the payment of his debts, or of his debts and legacies; or has made their payment a burden upon trustees to whom the *universitas* of his succession is conveyed. Where, in such settlements, the heritable estate is simply charged with the payment of *debts*, without the addition of words expressive of an intention to exonerate or discharge the personal or moveable estate from liability, it is an established rule of construction that the personal estate continues

whosoever shall have received it by a gratuitous title. With reference to the mode of enforcing this right, see the section of the preceding chapter which treats of the passive representation of disponees and legatees.

^(k) *Casamaijor v. Pearson*, 29 April 1841, 2 Rob. 217; *Waddell v. Waddell*, 9

March 1818, 6 Dow, 279; 6 Pat. 374; *Currie v. Threshie*, 4 July 1846, 8 D. 1021.

^(l) *Miller's Trs. v. Miller*, 23 Feb. 1848, 10 D. 765; *Berry's Trs. v. Cox's Trs.*, 18 June 1850, 12 D. 1087. See this subject more fully treated under the head of Abatement of Legacies; chap. 22, sect. 2.

to be primarily liable; and that the heritable estate is only burdened in further security, and to meet the case of a deficiency of the personal estate.^(m) This rule may be regarded as an extension of the general doctrine in relation to the liabilities of heirs and executors to cases of testamentary succession.⁽ⁿ⁾ We have seen that the rule is the same in regard to liability for *legacies* which are given generally, and not in the form of a charge or burden upon specific heritable estate.^(o)

2302. "The right of relief," says Erskine, "is not cut off from the heir by his accepting from the deceased a grant of the heritage with the burden of all his debts, moveable as well as heritable; for such burden is not to be interpreted to be imposed with any design to alter the natural course of the granter's succession, or to load his heirs or executors with the payment of debts in which they are not the primary debtors; but merely as a corroborative security to creditors, unless the contrary shall be evident from the special tenor of the grant."^(p) Such a declaration, accordingly, while effectual as an authority to the trustees to apply the heritable estate conveyed to them in satisfaction of debts and provisions, leaves the personal estate undischarged from its primary liability.^(q) And where, by Statute, money allowed to be borrowed on bond for the purposes of the Statute was declared to be a debt effectual against the granter and the heirs of entail succeeding him, and the granter died leaving a trust-deed and settlement, one of the purposes of which was the payment of all his debts,—it was held that the pro-

Rule stated by Erskine.

^(m) *Carnoustie v. Meldrum*, 1680, M. 5204; *Russel v. Russels*, 1745, M. 5211; *Denham v. Denham*, 1765, M. 5224; *Forbes v. Forbes*, 1766, Hailes, 138; *Bain v. Reeves*, 29 Jan. 1861, 28 D. 416.

⁽ⁿ⁾ *Douglas' Trs. v. Douglas*, 10 Jan. 1868, Sc. L. R. "The principle of the judgment in the case of *Carnoustie* applies in the case of testate succession also. But it is unnecessary to pursue the consideration of that question, for it appears to me to be matter of express decision that in testate succession the same rule applies unless the testator shall have otherwise provided. When a testator provides his heritable estate to one party, and his moveable estate to another, the same rules apply to these parties, unless another rule is specially appointed. I would go farther, and say that no loose expressions in a settlement will be allowed to defeat the general rule of law;" *per* Lord President Inglis,

citing *Fraser v. Fraser*, M. "Heir and Executor," App. No. 8.

^(o) *Supra*, § 2295 *et seq.*

^(p) Ersk. 8, 9, 48.

^(q) This rule of construction obtains also in the law of England. "It has long been the settled rule of Courts of Equity that a direction of the testator to sell or mortgage his real estate for the payment of his debts and legacies is not alone evidence of the intention of the testator that the personal estate should be exempt from these charges, and amounts only to a declaration that the real estate shall be so applied to the extent in which the personal estate (which by law is the primary fund) shall be insufficient for these purposes;" Williams on Executors, 6th ed., 1575, citing *Davies v. Ashford*, 15 Sim. 42; *Roberts v. Roberts*, 13 Sim. 336, and other cases. But see the Statutes 17 & 18 Vict., cap. 113, and 30 & 31 Vict. cap. 59.

CHAPTER LXXII. vision of the Statute was merely permissive; and that the general representatives were not thereby discharged of the liabilities primarily attaching to them. (r)

What expressions import a gift of residue discharged from liability for personal debts.

2303. A testator may, however, if he pleases, give the residue of his personal estate, as against his heir or donee, discharged from the payment of his debts and legacies. What are the forms of expression which shall be held demonstrative of an intention on the part of a testator to throw the primary liability for debts and legacies upon the real estate, is a question which has been the subject of many judicial determinations in England; but on which the decisions of our own Courts throw little light. It was long since settled in the law of England that express words exempting the personal estate were not essential; but, further than the assertion of this negative proposition, Lord Eldon (s) was unable to suggest any rule. Subsequent decisions of the Court of Chancery do not appear to have reduced the interpretation of such clauses within any definite rule or principle of construction. (t) Until this subject shall have been cleared by some authoritative exposition of the law in relation to Scotland, nothing more need be asserted, than that an intention to exonerate or relieve the personal estate may be collected from the general tenor of the instrument regulating the succession.

Intention to exoner the personal estate, in some cases inferred from the form of the testamentary dispositions.

2304. The circumstance that the real and personal estates are the subject of disposition under different deeds, is not to be considered as creating a presumption in favour of the exoneration of the personal estate. (u) But where, in a trust-disposition of heritable and moveable estate, certain debts and legacies are specially declared to be real burdens on the truster's lands, an intention to throw the primary liability for these upon the heritage may reasonably be inferred. (x) And where a settlor disposed his whole estate under the burden of certain legacies, and provided that, on the failure, which happened, of the party to whom the residue of his personal

(r) *Marquis of Breadalbane's Trs. v. Marquis of Breadalbane*, 7 July 1846, 8 D. 1062.

(s) "I can find," said that eminent judge, "no rule deducible from all that has been said on the subject, but this (which appears to be a rule supported by all the cases taken together), namely, that since it has been laid down that express words are not necessary to exempt the personal estate, there must be in the will that which is sometimes denominated 'evident demonstration,' sometimes 'plain

intention,' and 'necessary implication,' to operate that exemption;" *Booth v. Blundel*, 1 Meriv. 219.

(t) See the cases analysed in Williams on Executors, 6th ed., pp. 1575-1581.

(u) *Campbell v. Campbell*, M. 5218; 1 June 1749, 1 Cr. St. & P. 436. Here the Court gave weight to the presumption that an entailor intends to leave the entailed estate free from debt when he directs his debts to be paid from other sources.

(x) *M'Donnell v. Reynolds*, 21 May 1824, 3 Sh. 51, N.E. 33.

estate was given, it should be divided rateably amongst the general legatees, it was held that those legatees were entitled to payment of their pecuniary legacies out of the real estate, and that the same were not satisfied by the subsequent bequest of the residue of the personalty. (y) CHAPTER LXXII.

2305. The mere fact that a debt or provision is of an heritable nature, as an annuity, will not exempt the estate in the hands of the general representatives under a trust-settlement from liability, where one of the purposes of the settlement is the payment of all the granter's lawful debts. In order to discharge the general estate it must be shown that the burden has been distinctly laid upon some special subject; and it was so held in one of the branches of the *Breadalbane Trust* case. (z) But where a husband by his marriage-contract provided his widow in an annuity of £800, and bound himself to infeft her in certain estates in security thereof; and by a subsequently executed will declared that, in the event of there being no children of the marriage surviving, the said annuity should be increased to £1500; and bound his heirs and executors to pay the same to her accordingly,—it was held, partly on a consideration of the quality of the annuity as an heritable debt, and partly in respect of the presumed intention, that the whole annuity was a burden upon the heritage. (a) The circumstance that a debt or provision is charged upon an heritable estate in a testament or deed relating only to moveables, naturally creates a presumption that the personal estate is intended to be relieved; and such a declaration was accordingly sustained as effectual to relieve the personal estate where the granter had previously reserved power to himself to dispose of his heritage by testamentary writing. (b)

Exoneration of personalty not easily inferred where will or trust provides for payment of debts.

2306. In the construction of clauses charging specific heritable estates with debts and provisions, there is undoubtedly a strong presumption that the general estate, heritable or moveable, is meant to be relieved from its primary liability. In this class of cases it is evident that the liability depends wholly on the intention, as collected from the various deeds regulating the ancestor's succession. (c) This was expressly laid down by the House of Lords in the decision of the case of *Elliot's Trs. v. The Earl of Minto*, (d) where the ancestor, by deed of entail, had bound his

Presumption for exoneration where specific estates charged with debts.

(y) *Thorburn v. Thorburn*, 18 March 1858, 20 D. 829.

(z) *Breadalbane's Trs. v. Duchess of Buckingham*, 26 May 1842, 4 D. 1259 (first point); compare this case with *Jardine v. Lockhart*, 14 June 1833, 11 Sh. 720.

(a) *Wallace v. Ritchie's Trs.*, 7 July 1846, 8 D. 1038.

(b) *Davidson v. Nairn*, 1755, 5 Br. Sup. 289; compare this with *Govan v. Seaton*, 28 Jan. 1812, F.C.

(c) *Fergus v. Fergus*, 7 Feb. 1833, 11 Sh. 362, and cases cited *infra*.

(d) *Elliot's Trs. v. Earl of Minto*, 1 June 1833, 6 W. & S. 381, 387. See also the following cases on the liability of heirs of

CHAPTER LXXII. heirs-general to relieve the entailed estate of his debts, and, by a subsequent settlement, conveyed his whole property, heritable and moveable, to trustees, for the purpose, *inter alia*, of payment of his debts; and again, by a supplementary settlement, declared that the said debts should be satisfied out of the funds falling under the said trust; and that his, the settlor's, property in England should not be held or considered as falling under the foresaid trust-deed. The House of Lords, affirming the decision of the Court of Session, held that the intention to relieve the English estate was sufficiently manifested.

Cases illustrating the principle.

2307. Again, where a proprietor possessed of landed property in Jamaica bound himself by marriage articles to secure to his widow an annuity of £400, payable out of that property; and also bound himself, in the event of his purchasing lands in Scotland, to take the titles to himself and wife in joint fee and liferent in further security of the annuity; and he afterwards bought lands in Scotland, but did not infeft his wife in security,—it was held by the House of Lords, on a consideration of the settlor's intention, that the annuity was laid on the estate in Jamaica, without recourse against the heir succeeding to the heritable estate in Scotland.(e) So also, where a truster destined an heritable estate to his son, and warranted the disposition from all debts contracted or to be contracted, and afterwards by codicil burdened the estate with payment of "all just and lawful debts contracted by the said R., my son, and resting-owing at his death,"—it was held that full effect must be given to the codicil, according to the intention; and that the truster's general representatives were thereby exempted from liability for certain debts in which the truster was the primary obligant and the son was only liable *subsidiarie*.(f)

Effect where specific personal estate charged with debt.

2308. It is also evident that, where a testator gives a certain portion of his personal estate, and expressly directs that it shall be applicable to the payment of his debts, it is an exoneration *pro tanto* of the general personal estate.(g)

entail, and entailed estates:—*Hope v. Earl of Hopetoun*, 1799, M. "Presumption," App. No. 8; *Moncrieff v. Skene*, 29 June 1825, 1 W. & S. 672; *Howden v. Porterfield*, 17 June 1834, 12 Sh. 734; *Baugh v. Murray*, 14 Jan. 1834, 12 Sh. 279; *Sands v. Lady Brisbane*, 4 July 1835, 13 Sh. 1040; *Kerr v. Cochrane*, 9 Feb. 1836, 14 Sh. 458; *Farquharson v. Farquharson's Trs.*, 16 June 1866, 4 Macph. 831. Where a deed of entail provided that the annuities thereby authorised should not be burdens on the estate, but should only affect the rents, the

annuitant's representatives were held to have no claim against the rents accruing after her death in a question with a succeeding heir of entail; *Kiernan v. Campbell's Tutors*, 9 Feb. 1866, 4 Macph. 481.

(e) *Ogilvie v. Dundas*, 22 May 1826, 2 W. & S. 214, reversing M. "Discussion," App. No. 1.

(f) *Stewart v. Campbell*, 6 Feb. 1852, 14 D. 443.

(g) *Williams on Executors*, 6th ed. 1581, and cases there cited.

2309. The principles which have been expounded in relation to the exoneration or relief of the personal estate by the real, are applicable, *mutatis mutandis*, to the determination of claims of relief by heirs against executors in relation to heritable debts. A grant of the ancestor's whole moveable estate in favour of the executor, with the burden of all the granter's debts, heritable as well as moveable, does not relieve the heir or disponee of the heritage from the burden of the debts affecting it. *(h)* And where a testator granted and disposed his landed estates in Scotland to his heir-at-law, and in the same deed bequeathed all his personal estate to his executors therein named, and directed that his funeral charges and expenses, together with all his just and lawful debts, should be paid by the said executors,—it was ruled that the direction of the will did not exoner the disponee of the heritable estate from liability for an heritable debt secured upon it; and the judgment was affirmed in the House of Lords. *(i)* *A fortiori*, where an heritable estate is disposed with the burdens affecting it, and the ancestor's other estate is settled by will or trust-deed, subject to a general direction for payment of all the truster's lawful debts, the disponee is not entitled to relief of the heritable debts in a question with the general estate. *(k)*

CHAPTER LXXII.
Application of the foregoing rules to the determination of questions of relief.

2310. Where a testator gives his real and personal estate as a mixed or blended fund, and charges the whole with the payment of his debts, or of debts and legacies, he is held, according to the rules of construction adopted by the Courts of Equity in England, to have manifested an intention that the real and personal estates should contribute rateably to the common burden. *(l)* In order that the rule should apply, there must be either a trust for sale, operating a conversion of the truster's succession from heritable to moveable, or a power of sale in relation to the real estate, expressed in such terms as indicate an intention that the power should be

Real and personal estates blended by testator held liable for debts, etc., in proportion to their values.

(h) Ersk. 3, 9, 48; *Sinclair v. Fraser*, 1798, Hume, 176.

(i) *Fraser v. Fraser*, M. "Heir and Executor," App. No. 3; *nom. Fraser v. Spalding*, 20 July 1812, 5 Pat. 642. "The Court of Session were of opinion, that without a special clause in the deed to that effect, the legal rules of accounting between heir and executor could not be altered;" 5 Pat. 645. The rule was severely tested in this case, for, as appears from the report, the heritable debt was the only debt subsisting at the testator's death;

and thus the direction to the executors did not come into operation. See also *Frew v. Frew*, 15 Feb. 1828, 6 Sh. 554.

(k) *Campbell v. Campbell*, 1817, Hume, 180; *Carrick's Trs. v. Moore*, 11 June 1840, 2 D. 1068; *Henderson v. Hamilton*, 29 Jan. 1858, 20 D. 473.

(l) 2 Jarman on Wills, 3d. ed. 592; Williams on Executors, 6th ed. 1582; *Roberts v. Walker*, 1 Russ. & M. 752; *Att.-Gen. v. Southgate*, 12 Sim. 77; *Simmons v. Rose*, 21 Beav. 37; and other cases cited by these authors.

CHAPTER LXXII. carried into effect so far as necessary for the purpose of providing a fund for the payment of the debts and provisions in question. (m)

(m) *Boughton v. Boughton*, 1 H. L. Ca. 406; *Falkner v. Grace*, 9 Hare, 282. In the recent case of *Young v. Martin*, 6 Feb. 1868, the rule was brought under the notice of the First Division of the Court; but it was held to be inapplicable, there being no express direction to sell or trust for

sale. It would rather appear from the English authorities that the proper sphere of the rule is in cases of resulting trusts, to which, as we have elsewhere seen, the ordinary rules of constructive conversion are inapplicable.

CHAPTER LXXIII.

LIABILITIES INCURRED BY TRUSTEES AND EXECUTORS TO CREDITORS OF THE ESTATE.

2311. We have thought it desirable, even at the risk of some repetition, to treat more systematically and fully of the subject of the liabilities of trustees and executors than the example of other writers on the subject would seem to warrant. But the great practical importance of questions affecting the personal interests of trustees, and the uncertainty which pervades this branch of the law, call for a copious and, as far as may be, an exhaustive treatment of the subject. The subject of liability naturally divides itself into the two main questions which are discussed in this and the next chapter: *First*, the question of liability to creditors of the estate—that is, to parties whose claim is not founded on the will or settlement, but upon obligations undertaken by the trustee expressly or constructively; and *secondly*, the trustee's liability to the truster himself, or to the heirs or beneficiaries pointed out by the settlement. (a) In the first class of questions, the liability of the trustee depends solely on the nature of the obligation which he has undertaken to the party seeking to make him personally responsible; in the second, it is dependent on the nature of the diligence prestable from persons holding the fiduciary office, viewed in connection with the powers conferred and obligations imposed by the will or settlement. This classification would naturally embrace questions as to the liabilities of trustees for law expenses; but as the liability of trustees for the expenses of litigation is controlled by the operation of the equitable jurisdiction of the Court—an element which does not enter into the consideration of liabilities arising from contract, or from the relation of trustee and beneficiary—it has been thought proper to reserve that branch of the subject for separate discussion. The liability of trustees and executors for expenses will accordingly form the subject of the concluding chapter of the series. (b)

(a) See Chapter 74.

(b) Chapter 75.

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Personal liability to creditors distinguished from personal obligation to make funds forthcoming.

Trustees may incur liability for truster's obligations, either (1) by adopting them, or (2) by putting away the funds.

Trustee adopting obligation makes it his own.

Consequences of denuding of the estate before the debts are discharged.

2312. To proceed with the subject of the liability undertaken to creditors of the estate, it is proper to notice in the outset, that as we are dealing at present with the subject of liability arising from personal obligation, we necessarily exclude from consideration, except in the way of a passing reference, all questions as to the liability of the trust-estate for the debts of the truster. A trustee is of course liable, in his character as a general representative of the truster, to fulfil the obligations of the latter. But those are obligations which can only be enforced against him *as trustee*; in other words, they are enforceable against the trust-estate in an action in which the trustee is a necessary defender. In treating of the duties of the trustee, (c) we have already had occasion to consider the obligations incumbent upon him which respect the preservation of the estate, its equitable distribution amongst those who are interested, and the rules according to which the relative interests of the several classes of beneficiaries may be affected by the diligence of creditors. The obligation to pay or perform on behalf of the truster only assumes the form of a personal liability when the trustee deals *inequitably* with the creditors of the estate.

2313. As preliminary to the discussion of some more important questions as to the liabilities of trustees *ex obligatione*, we may refer, but very briefly (for this point is also dealt with in the chapters on administration), to the class of cases in which trustees have been held personally liable for the truster's engagements, either on the principle of novation, in respect of their own adoption of current contracts, or on the principle of liability for negligence, consisting in the inequitably disposing of the funds which they were bound to make available to all the creditors of the trust-estate. On the first point, it is sufficient to say that the liability of trustees, in respect of their adoption of subsisting contracts, is subject to the operation of the same rules of law which determine the liability of trustees for contracts of their own making. The cases will be noticed in treating of the main question.

2314. As to the second ground of liability above mentioned, the rule of law may be sufficiently illustrated by referring to a few of the leading cases. (d) For example, in *Young v. Johnston's Trustees*, (e) gratuitous trustees were held liable for payment of a debt

(c) Chapters 68 and 67.

(d) The question here referred to, which is always to a considerable extent mixed up with consideration of *bona fides*, is here viewed in relation to the right of the creditor. In chapter 68 the same question is noticed in connection with the right of the

trustee to retain the estate until he can denude with safety; and in chapter 76, the extent of the beneficiary's right to demand implement (which may be a conflicting right) is the subject of consideration.

(e) *Young v. Johnston's Trs.*, 15 June 1841, 3 D. 1020.

due to one of the truster's creditors, because, at a time when the estate would have been sufficient, if realised, for the liquidation of all the claims, they had chosen to keep up two debts upon the estate, and had granted a bond in security of one debt, instead of providing equally for both. The amount realised by the sale of the estate having proved insufficient for the payment of both creditors, the trustees were justly held liable for the amount of the damage sustained by the unsecured creditor in consequence of the creation of this illegal preference. In another case, where trustees had been directed to purchase a landed estate with the residue of the testator's funds, to be conveyed by them to his heir, subject to the conditions of a strict entail; and they conveyed the entire succession, without having provided for the payment of an annuity chargeable against the truster's estate under his contract of marriage,—they were held liable in a personal action for the value of the annuity.(f) To this principle we may also refer the rule of law, according to which an executor who intromits with the personal estate, without confirmation or making up inventories, is liable to creditors on the passive title of vitious intromission.(g) If, again, in the case of a trust for payment of debts, a creditor does not declare his accession to the trust, and makes no claim under it;(h) or if, after acceding, he acquiesces in the decision of the trustee repelling his claim,(i) —he is held to be precluded by his own conduct from afterwards seeking to enforce the claim by a personal action against the trustee.

2315. In virtue of his right to call upon the trustee to make the funds of the truster forthcoming, a creditor of the trust-estate may raise in his own name any question of liability, as for negligence or breach of the fiduciary relation, which a beneficiary named in the trust-deed might have raised. This principle was clearly recognised in the case of the *Bon Accord Marine Insurance Co.*(k) The directors of a company in which the deceased truster held shares, raised

Creditors may insist in any claim against the trustee competent to a beneficiary.

(f) *Cruickshank's Trs. v. Cruickshank*, 24 April 1845, 4 Bell, 179; and see *Aitken v. Reid*, 10 Feb. 1829, 7 Sh. 890. See *Fraser v. Fraser*, 8 Dec. 1826, 5 Sh. 104, N. E. 96.

(g) *Cunningham v. M'Kirdy*, 8 Feb. 1827, 5 Sh. 315, N. E. 292; *MacEachern v. MacEachern*, 26 Feb. 1833, 11 Sh. 441; *Forbes v. Forbes*, 12 June 1828, 2 Sh. 395, N. E. 851; *Scott v. Lord Belhaven*, 25 May 1821, 1 Sh. 33; cases in Morrison and Elchies, *vide* "Vitious Intromission;" also 4 Br. Sup. 374, 416, 424, 813; 5 Br. Sup. 838. On the question, how far confirmation as executor-creditor will protect an intromit-

ter not claiming through him, see *Montgomery v. Boswell*, 20 Dec. 1841, 4 D. 832; *Dudgeon v. Dudgeon's Trs.*, 9 March 1844, 6 D. 1015.

(h) *Pagan v. Campbell's Trs.*, 17 Jan. 1828, 2 Sh. 125.

(i) *Jeffrey v. Ure*, 21 June 1825, 1 W. & S. 565, reversing 2 Sh. 646. Chapter 76.

(k) *Bon Accord Marine Ins. Co. v. Souter's Trs.*, 18 June 1850, 12 D. 1010, 11 Dec. 1850, 13 D. 295; and see the English cases cited *infra*, chapter 74, upon the liability of the executor as for a due administration.

CHAP. LXXIII. an action against the trustees for the purpose of constituting their claim for calls upon the estate. The question was, what was the value of the estate for which the trustees were bound to account? In the second branch of the case, the trustees were held liable to the company, as creditors, to replace a sum which they had invested on hazardous security, and which had been lost in consequence of their having to sell the security below its value to meet the calls.^(l) And in the same case, the trustees were not allowed to take credit, in accounting with the company, for a sum which they had paid as commission to two of their number, who acted as law agents and factors to the trust.^(m) It will therefore be understood that the questions of liability to parties beneficially interested, which form the subject of discussion in the next chapter, may also be raised by creditors, in virtue of their right to have the estate made available to them.

If a trustee is either (1) expressly bound in, or (2) expressly relieved from personal responsibility, the condition is binding.

2316. We pass now to the consideration of the main question, namely, In what circumstances are trustees to be held personally responsible for the fulfilment of obligations undertaken by them for the benefit of the trust-estate? In order still further to narrow the field of discussion, two propositions may be laid down, which, if not self-evident, are at least so well settled in principle and in practice, that no controversy can be raised regarding them. *First*, if a trustee expressly undertake personal responsibility, as by interposing his guarantee to protect the estate from diligence, taking, it may be, an assignation to the debt in his own name;⁽ⁿ⁾ or by executing a cash-credit bond, "as trustee and individually," to pay whatever sums may be advanced by the bank for the purposes of the trust-estate;^(o) or by undertaking a purchase on behalf of his constituent, without declaring the name of the party for whom it is made;^(p) he does, in virtue of the terms of his contract, come under a personal obligation to fulfil it. *Secondly*, by parity of reasoning, if a trustee stipulate in express terms that the trust-estate alone, and not he as an individual, shall be responsible for the fulfilment of his contract, he will lie under no higher degree of liability than that implied in warrandice from fact and deed,—that is, he is under obligation to make the trust-estate forthcoming to the creditor to the extent to which it can, consistently with the rights of other creditors, be affected by the contract. In the case of an executory contract,—*e.g.*, a sale upon missives, or an agreement to borrow

(l) 18 D. 295.

(m) 12 D. 1010.

(n) *Lawson v. Walker*, 8 Dec. 1845, 8 D. 282.

(o) *Commercial Bank v. Sprot*, 27 May

1841, 8 D. 939. See *Carswell v. Irvine*, 15 Jan. 1850, 12 D. 462.

(p) *Thomson v. Dudgeon*, 4 June 1851, 18 D. 1029. The appeal in this case did not touch the merits of the decision.

money,—this is the only kind of liability which a trustee can be asked to undertake. *(q)* CHAP. LXXIII.

2317. That an obligation by trustees to repay a loan out of the trust-estate, “when and as soon as the state of the funds will permit,” does in point of law import a personal liability *to make the estate forthcoming*, was expressly decided in the case of *Aitken v. The Glasgow Road Trs.* *(r)* In this case, the Sheriff having found that there was no fund or balance in the hands of the trustees which could warrant a decree for the sum concluded for, and therefore sustained the defences, the Court, recalling Lord Medwyn’s interlocutor, which was affirmatory of the Sheriff’s, remitted to the Lord Ordinary to allow an investigation into the state of the defender’s funds since the date of the contract. “I have no conception,” said Lord Justice-Clerk Boyle, “that it was left to the managers of the fund to postpone payment of this claim to any time they pleased. . . . The question is, When is it exigible by the contract? I answer, that it is exigible whenever the funds are sufficient, or would have been sufficient, had the trustees not preferred other claims, or incurred other expenses by works which they were not bound to execute.” *(s)*

2318. A *third* proposition, of very general application to questions between creditors and trustees, is, that trustees are only personally liable in respect of their own individual engagements, and not for those of their co-trustees. For, as a trustee is not bound by the duty of his office to interpose his personal security on behalf of the estate, there is no principle upon which the voluntary and gratuitous engagement of his co-trustee can be made operative against him. It is remarkable that, even in the comparatively recent period of the chancellorship of Lord Eldon, this doctrine, so clearly grounded in equity, should have been considered open to question. The point arose in an action by certain of the trustees of the Edinburgh and Glasgow Road Trust against their co-trustees, for relief of obligations undertaken by them, in the names of themselves and the whole other trustees, to creditors who had advanced money for the purposes of the trust. The Court of Session decerned, in the first instance, against the defenders. Lord Eldon, in that spirit of caution which with him was too frequently carried to excess, remitted to the Court below to consider whether there was

Terms which import a personal obligation.

Trustees are not liable to creditors of the estate for the engagements of their co-trustees.

Higgins v. Livingstone.

(q) See the cases of *Forbes’ Trs. v. Mackintosh*, 15 June 1822, 1 Sh. 497, N. E. 462; and *Kelly v. Macindoe*, 6 Mar. 1858, 20 D. 773, where it was settled that the proper warrandice to be granted by trustees, in any deed which they were under

obligation to execute, was warrandice from fact and deed.

(r) *Aitken v. Glasgow Road Trs.*, 10 Feb. 1829, 7 Sh. 390.

(s) 7 Sh. 391.

CHAP. LXXIII. any principle upon which the mere attendance at meetings, in the execution of the ordinary business of the trust, could be held to import a personal undertaking of liability for written contracts to which the defenders had not been parties.(t) On inquiry and reconsideration, the Court found, as to one of the parties, no acts condescended on sufficient to make him personally liable; and in particular, that his authorising contracts could not be presumed to be an authority for entering into contracts by which he would be personally bound.(u) This judgment was affirmed on appeal.

Opinion of
Lord Eldon.

2319. The speech of Lord Eldon, taken from the notes of the shorthand writer, is reported in Paton's Appeal Cases.(x) On principle, as well as on the authority of English decisions,(y) Lord Eldon came to the conclusion,—1st, that when trustees state in their contracts that they mean to act in the execution of the trust, *prima facie* this ought not to be taken to make them personally liable; 2dly, notwithstanding the existence of authority for the more sweeping doctrine, that trustees contracting simply with other persons, who do not know whether they have a fund applicable and sufficient for the purpose, should be taken as representing that they had a fund applicable and sufficient, his Lordship was not clear that their liability could be put any higher than this, that if the trustees chose to enter into contracts, the terms of which were to make them personally responsible, they were at liberty to do so, and the contracts would be binding upon them;(z) 3dly, that where the trustees confine themselves to the execution of their powers,—e.g., if in this case the trustees had interfered with nothing but the application of the funds which, as parliamentary trustees, they were entitled to raise and apply,—then the resolutions of the majority would bind the other trustees present at the meeting; but, 4thly, if they thought proper to enter upon the consideration of subjects that did not belong to the strict execution of the trust, *there* the acts of a majority of the trustees present at a meeting would not bind the minority; “and if the majority, or any part of it, thought fit to make themselves, by their contracts, personally responsible, it would not be enough to say that, at such a meeting, the majority had bound themselves; but in order to prove that the minority were bound, they must go on to show *by what individual*

(t) *Cunynghame v. Higgins*, 26 June 1802, 4 Pat. 401.

(u) 6 Pat. 245.

(x) *Higgins v. Livingstone*, 1 July 1816, 6 Pat. 244; and see *Ochill Turnpike Trs. v. Horn*, 20 June 1822, 1 Sh. 513, N. E. 475.

(y) See *Horseley v. Bell*, 1 Br. Ch. Ca. 101, note.

(z) 6 Pat. 253. It will be seen from the sequel, that there is no longer any doubt, in the case of a simple contract, that an indefinite obligation implies personal responsibility.

acts, by what species of concurrence, by what kind of homologation, by what kind of approbation, these individuals became parties, not for the execution of the trusts of the act, but for the execution of the acts for which they were to be made responsible."(a)

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2320. We are now in a position to assume, first, that a trustee cannot be rendered personally liable for the trust obligations unless he binds himself; and further, that where the character in which the trustee obliges himself is expressly set forth in the contract, the terms of the contract furnish the criterion of liability. But that which in more recent times has created the whole difficulty in relation to questions of liability, is the use of an indefinite form of obligation,—that is, where the trustees are bound, either *simply* or with the addition of their *designation* as trustees. We are now to show, by an examination of the cases, that the character of the liability incurred by trustees, when they contract under their designation as such, depends upon the nature of the contract. The decisions in reference to the several classes of contracts have been tolerably uniform; and, considering the immense importance to individual interests that the law in this quasi-penal department of civil jurisdiction should be uniformly interpreted, it is some satisfaction to be assured, so far as experience can assure us, that the authority of established precedents is likely to be maintained.

Subject resumed.

General rule, that the nature of the contract determines the degree of liability.

2321. The leading rules respecting liability under *indefinite* obligations (using the term in the sense explained in the last paragraph) are these—(1) An obligation under a simple contract debt is personally binding upon the contracting trustee: (2) An obligation in the nature of a personal security is personally binding on the obligant: (3) Indirect personal obligations, constituted through the intervention of a party having authority to bind the trustee—*e.g.*, a partner or manager of a mercantile company in which the trust-estate holds stock—are binding upon all the trustees who have sanctioned the investment, in like manner as in the case of direct

Liability on different contracts distinguished. Simple contract debt. Personal security.

Indirect obligation.

(a) 6 Pat. 255. On the question of liability for the contracts of co-trustees in respect of homologation, see *Hamilton v. Gibb*, 16 May 1823, 2 Sh. 315, N. E. 278, and *Graham v. Graham*, 15 June 1827, 5 Sh. 806, N. E. 745. In the first case, one of several co-trustees, under a trust to sell for behoof of creditors, had, in order to get up the title-deeds—which were hypothecated for the grantor's business account—granted an obligation, bearing to be on behalf of himself and his co-trustees, to see the agent paid the just balance of his accounts. To a joint action for pay-

ment, the non-subscribing trustee pleaded that he had given no authority to bind him, and had received no part of the price. He was held liable, in respect that he had signed the articles of roup and the disposition to the purchaser discharging the price, and that the deeds in question were necessary in order to sell the property. In the second case, where two trustees were held jointly liable upon an obligation to enter into a submission granted by one of them, the precise circumstances which were held to import homologation do not appear.

CHAP. LXXIII.

Continuing
contracts.
Real securities
and sale.

Partnership.

Negligence.

Trustees are
personally liable
upon their own
contracts.

obligations: (4) Continuing contracts, as leases and feu contracts, are personally binding: (5) Where the purpose of a contract is the conveyance of heritable property, or the creation of a real security, the adjection of a collateral personal obligation, granted by individual trustees under their designation of trustees, is equivalent only to a personal undertaking on the part of the subscribing trustees to make the trust-estate forthcoming to the creditor to the extent of their powers; in other words, it is equivalent to warrandice from fact and deed: (6) Trustees investing trust-money in the stock of a joint-stock company, and subscribing the contract under their designation as trustees, are liable as partners in their individual capacity, and not merely as trustees: (7) Trustees are personally liable to make reparation for their own wrongful acts, although arising in the course of the trust-administration; but they are not personally responsible for the fault of their employees.

2322. (1) The doctrine, that trustees are liable personally to implement the contracts to which they become parties for the benefit of the estate, was established by Lord Eldon's judgment in *Higgins v. Livingstone*. (b) The principle was also applied in the judgment of the House of Lords in *Jeffrey v. Brown*. (c) The appellants, who were trustees on the sequestrated estate of a shipping firm, entered into an agreement with the respondents, who held a security over a ship, part of the bankrupt's estate, by which agreement the respondents agreed to give up all claims upon the vessel on condition that they were paid the sum of £2000, and were relieved of the engagements contracted by the agents of the bankrupt affecting the said vessel. The appellants, having found that the claims against the vessel were greater than they were able to meet from the funds in their possession, resisted payment, and pleaded (d) that, both from the mode in which the action was libelled and from the nature of the office which they held, they could not be liable to any greater extent than that of the trust-funds of which they were in possession, and were not bound to find funds in order to satisfy the claims of the respondents; and therefore, as they had no trust-funds, the judgments of the Court below, finding them personally liable, were erroneous. The judgment of the Court

(b) *Higgins v. Livingstone*, 1 July 1816, 6 Pat. 244; *Hamilton v. Gibb*, 16 May 1828, stated above, § 2319, note.

(c) *Jeffrey v. Brown*, 11 June 1824, 2 Sh. (Ap. Ca.) 349, affirming, but qualifying, the judgment of the Court, 1 Sh. 102. See *Hay v. Cockburn's Trs.*, 19 July 1850, 12 D. 1298, and 8 D. 1011. An il-

lustration of a different nature is afforded by the case of *Norton v. Braidwood*, where an obligation to accept a charter from the superior, undertaken by the agent of the trust (himself a trustee), was held binding on the trustees in a question with the superior; 21 Jan. 1858, 20 D. 482.

(d) 2 Sh. (Ap. Ca.) 355.

of Session, finding the appellants personally liable to fulfil there contract was affirmed, with costs. (e) CHAP. LXXIII.

2323. The only exceptions to, or limitations of, the rule of liability as for simple contract debts, are those which have been noticed in the outset:—viz., that a trustee may expressly contract so as only to bind the estate; and that contracts entered into by individual trustees, although purporting to bind the entire body, are obligatory only on the subscribing trustees, unless authority were given by the others. The cases upon the liabilities of members of provisional committees illustrate the limitation last referred to. Those decisions have established the rule, that attendance at meetings does not bind the individual members of a committee for the contracts undertaken on behalf of the committee, and that, in order to fix individual liability for specific contracts, the defender must be proved to have given authority. (f) Exceptional cases.

2324. (2) The most apposite illustration of our second proposition—viz., that trustees are liable on obligations in the nature of personal securities—is to be found in the cases on liability upon bills of exchange. The doctrine here adverted to may either be viewed as a particular case of liability, as for contract debt, or it may be rested on the separate ground, that bills of exchange are in their own nature personal securities, and nothing else. A bill of exchange does not create a debt; on the contrary, the presumption of debt may be redargued by legal evidence of non-onerosity. The purpose of a bill is to create what may in popular language be termed a security; the nature of the security being, that the obligant surrenders his personal liberty, and submits to incarceration on a formal warrant obtained without the intervention of a decree, in the event of his being unable to meet the bill on the elapse of the appointed period of payment. In order that a trustee obliging himself under a personal obligation of this nature should be exempt from personal liability, it is necessary that the limitation of liability should be expressly declared. Accordingly, in all the cases that have occurred upon bills of exchange, the liability has been held to be personal. The decisions embrace questions involving the liabi- Trustees are personally liable upon bills and personal securities.

(e) 2 Sh. (Ap. Ca.) 356. The rule that trustees and executors are liable to fulfil their contracts with strangers to the trust, is now so well established by native authority, that it is unnecessary to occupy space with explanatory notes on the English decisions. The following cases may, however, be referred to as among the most authoritative:—*Childs v. Monins*, 2 Bro. &

Bing. 460; *Bradley v. Heath*, 3 Sim. 543, see 558, decided by Shadwell, V.-C.; *King v. Thom*, 1 T. R. 489; *Appleton v. Binks*, 5 East. 148.

(f) *M'Ewan v. Campbell*, 19 Feb. 1857, 2 Macq. 499; *Bright v. Hutton*, 3 H. of L. Ca. 341; *Johnston v. Scott*, 18 Jan. 1860, 22 D. 393.

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lity of executors ;(g) trustees under family settlements ;(h) trustees for behoof of creditors ;(i) trustees of religious associations ;(k) and factors.(l) The defence, that the trustees had no available funds, has been expressly overruled.(m) The question, whether the trust-estate is bound by the trustees' bill, depends, it would seem, upon the circumstance whether the trustees were acting within their powers and for the benefit of the estate.(n) On the analogy of the cases upon obligatory letters,(o) we may conclude that a personal bond would also be personally binding on the subscribing trustees.

Personal bonds.

Liability of trustees to the public as members of a partnership or joint-stock company.

2325. (3) On the question, whether trustees investing trust-money in trade, or in the shares of joint-stock companies, are liable as partners to fulfil the engagements of the company, there is no direct authority in the law of Scotland ; but there can be little doubt that the trustees are so liable, on the broad principle that liability as a partner is incurred by every person who holds himself out as a partner, irrespective of the nature of his interest in the partnership, and even though he has no interest in its concerns.(p) Opinions to this effect were expressed by the Lords who took part in the judgment on the appeal in the *Western Bank* case ;(q) and the English authorities show that, in the sister country, trustees are held to incur liability to creditors of the partnership in the same degree as other individual partners.(r) A trustee may indirectly incur responsibility in various ways ; as, for instance, in the case of his empowering the factor to the trust to enter into a particular contract ;(s) or as, in the case of a trust for payment of creditors, where

Indirect responsibility.

(g) *Eaton Hammond & Sons v. Macgregor's Exrs.*, 25 May 1837, 15 Sh. 1012.

(h) *Pattie v. Thomson*, 23 Dec. 1848, 6 D. 350 ; *Thomson v. M'Lachlan's Trs.*, 24 June 1829, 7 Sh. 787.

(i) *Murray v. Campbell*, 28 Nov. 1827, 6 Sh. 147 ; *Findlay, Bannatyne, & Co. v. Ord*, 10 July 1846, 8 D. 1089 ; *Anderson v. M'Dowal*, 21 March 1865, 8 Macph. 727.

(k) *Ross v. Albion Joint-Stock Co.*, 14 Jan. 1831, 9 Sh. 275.

(l) *Webster v. M'Calman*, 3 June 1848, 10 D. 1133.

(m) *Eaton Hammond & Sons v. Macgregor*, *supra*.

(n) *Pattie v. Thomson ; Findlay, Bannatyne, & Co. v. Ord*, *supra*.

(o) *Jeffrey v. Brown*, 11 June 1824, 2 Sh. (Ap. Ca.) 849, affirming 1 Sh. 102 ; *Graham v. Graham*, 15 June 1827, 5 Sh. 806, N. E. 745. In the cases on cash-credit bonds, the obligation was expressed to be personal ; see *Commercial Bank v.*

Sprot, 27 May 1841, 3 D. 939 ; *Carswell v. Irvine*, 12 Jan. 1850, 12 D. 462. In practice, it is understood that a personal bond would not be accepted from trustees, unless they bound themselves as individuals.

(p) See *Gardner v. Anderson*, 21 Jan. 1862, 24 D. 315, and cases cited in M.F. & Cl. on Issues, 502, in which issues were granted putting the question, whether the defender held himself out as a partner.

(q) *Lumsden v. Buchanan*, stated *infra*, § 2333.

(r) Trustees and executors trading with trust-funds, under their collective designation, are held to be subject to the operation of the bankruptcy laws ; and the creditors have no claim against other portions of the trust-estate invested in the names of the beneficiaries ; *ex parte Garland*, 10 Ves. 110. See *ex parte Richardson*, 1 Buck, 202.

(s) *Thomas v. Walker's Trs.*, 4 July 1839, 7 Sh. 828 ; 4 Dec. 1832, 11 Sh. 162.

he permits the bankrupt to carry on the business which is the subject of the trust, or accredits his transactions. (t) CHAP. LXXIII.

2326. (4) On the subject of continuing contracts other than that of partnership, the rule of liability is exemplified in the decisions, under which trustees adopting leases have been held liable to the proprietor for his rent. (u) But, in this class of cases also, there is room for the defence of special contract; for the landlord may waive his claim, and allow the lease to be taken up without stipulating for the personal security of the trustee. (x) On the other hand, should the trustee insist on remaining in possession, at the same time repudiating personal responsibility, he will be liable for the value of his occupation of the subjects, if not in the shape of rent, at all events in the equivalent form of damages. (y) With regard to liability for feu-duties, it appears that infeftment is the test of the adoption of a feu; as it is only upon acceptance of the feudal estate that the vassal becomes bound to fulfil the prestations of the charter. (z) Accordingly, it has been ruled that, pending a dispute as to the validity of the bankrupt's title, the trustee may enter into possession without thereby incurring a personal responsibility. (a)

Liability of
trustees as
tenants,

and feuars.

2327. (5) The nature of the transaction being, in the absence of direct stipulation, the main element in the determination of all questions of personal liability, it seems to follow that, unless personal liability must be invariably presumed, the usual personal obligation in heritable securities is not obligatory upon the person of the individual trustee, except to the extent of obliging him to make the estate available. This exception to the general rule of liability was established, upon sound principles, by the concurring decisions of the Lord Ordinary and the Court in *Gordon v. Campbell*, affirmed by the House of Lords on appeal. (b) Mr Bell's trustees, of whom the respondent Mr Campbell was one, borrowed from the appellant, Colonel Gordon, a sum of £7000 for the purposes of the trust-estate. For this loan they gave the appellant a bond and disposition in security (c) over the trust-estate, containing

Liability of
trustees as bor-
rowers upon
heritable secu-
rity.

*Gordon v.
Campbell.*

(t) *Murray v. Campbell*, 28 Nov. 1827, 6 Sh. 147.

(u) *Fairlie v. Neilson*, 18 Dec. 1821, 1 Sh. 222, N.E. 211; and see chapter 63, sect. 1. *Contra, Dundas v. Kirkaldy's Tr.*, 21 June 1853, 15 D. 753.

(x) See *M'Gregor v. Hunter*, 21 Nov. 1850, 13 D. 90.

(y) *Stead v. Cox*, 20 Jan. 1835, 13 Sh. 280; *Richardson v. Scott*, 24 June 1835, 13 Sh. 972.

(z) *Marquis of Abercorn v. Grieve*, 16 Dec. 1835, 14 Sh. 168; *Mitchell's Tr. v. Pearson*, *infra*.

(a) *Mitchell's Tr. v. Pearson*, 28 Jan. 1834, 12 Sh. 822.

(b) *Gordon v. Campbell*, 18 June 1842, 1 Bell, 428, affirming 2 D. 639.

(c) It is called an "heritable bond" in Bell's report.

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an obligation of repayment in the following terms: "Which sum of £7000 sterling, we, as trustees aforesaid, bind and oblige ourselves, and the survivors or survivor of us, and such other person or persons as may be assumed by us in virtue of the powers committed to us by the said trust-deed, and by which trust-deed it is declared, that when the trustees shall amount to or exceed three, a majority shall in all cases be a quorum, to content and repay to the said John Gordon, his heirs, assignees, or successors whomsoever, at the term of Whitsunday next." On this bond a personal charge for payment was given to one of the subscribing trustees. Lord Moncreiff, Ordinary, the judges of the Second Division, and Lords Brougham, Cottenham and Campbell in the Court of Appeal, concurred in the opinion that the terms of the bond did not import a personal undertaking, but that of trustees only; and the charge was accordingly suspended.

Opinion of
Lord Campbell.

2328. Lord Campbell observed, "It is clear there was only a limited liability, and not an absolute liability, *in solido*, for the whole of this advance. The party takes care to state that he contracts in his character of trustee, in words which I need not repeat (treating the trustees as a body, like a corporation), avoiding personal responsibility; and therefore I think he was not liable, and was entitled to the suspension."^(d) We are aware that it has lately been suggested that this decision turned on the effect of the special destination introduced into the obligatory clause; though we do not discover from the opinions of the law Lords that the judgment of the House proceeded on any other ground than that the parties contracted in their character "as trustees." But the decision has been universally regarded as an authoritative recognition of the principle of non-liability, in cases where trustees become bound in their collective character, under a contract of the nature of an heritable security; and we do not think that any claim inconsistent with this doctrine in its generality could now be successfully maintained.

Liability of
trustees as
vendors in
warrandice.

2329. It follows, by parity of reasoning, that trustees are not liable, in consequence of executing a conveyance of trust-property for a valuable consideration, in personal warrandice. The purchaser must satisfy himself of the sufficiency of the title, and he is entitled to have the beneficiaries bound absolutely. If the security is inadequate, *sibi imputet*.^(e) It is not meant to be affirmed, however, that trustees bound simply would not be liable in personal warrandice; but merely, that in carrying the contract of sale into execu-

(d) 1 Bell, 457.

June 1822, 1 Sh. 497, N. E. 462; *Kelly v.*

(e) See *Forbes' Trs. v. Mackintosh*, 15 *Macindoe*, 6 March 1858, 20 D. 773.

tion, the trustees are entitled to protect themselves by inserting a clause limiting their liability to warrandice from fact and deed. CHAP. LXXIII.

It has never been expressly decided whether trustees, assigning a personal right, are bound to warrant the subsistence of the debt. Warrandice of assignments and sales of personal property. We rather think that, in the absence of an express bargain to the contrary, they would. In sales of ships and other corporeal moveables, it is not usual to stipulate for express warrandice; but we incline to think that the trustees undertake by the sale an implied personal obligation to warrant the title.

2330. (6) The liability of trustees subscribing the contract of a joint-stock company, in their collective capacity, and registered under their designation, was confessedly an open question in Scotland until the decision of the cases at the instance of the liquidators of the Western Bank. In the treatise on which the present work is founded, an opinion was expressed (in opposition to the view which had been taken of the question in the Court of Session), that trustees were liable for calls in the same degree as other shareholders, unless their liability were restricted by the act of the shareholders, or by a general clause in the company's deed of settlement. That opinion has been fully confirmed by a unanimous judgment of the House of Lords, in the case of *Lumsden v. Buchanan*; (f) and the point is therefore no longer open to discussion. It may not, however, be altogether useless to examine the different conditions under which questions of this kind may be presented.

2331. In the first place, it is clear in principle, and undisputed in practice, that trustees who, without authority, or in breach of their trust, invest the trust-money in the shares of a mercantile company, are personally liable in contribution as partners; and that the trust-estate is exempt from liability. (g) In the case of the *Bon Accord Insurance Company*, (h) it seems to have been assumed that the trustees were not personally liable, probably because they had not subscribed the company's contract; and the only question raised was as to the extent to which they were liable to make the trust-estate forthcoming. In the more recent cases which have been referred to, the argument for the trustees was based on the assumption that they had acted within their authority in making or continuing the investments, and it was admitted that a trustee who invests the trust-money in shares, without authority given by the deed of trust, is to be held to have made the investment as an individual shareholder. Unauthorised investments.

(f) Stated *infra*, § 2333.

(h) *Bon Accord Ins. Co. v. Souter's Trs.*,

(g) *Dundee Ry. Co. v. Miller*, 31 Jan. 1832, 10 Sh. 269; *Malcolm v. West Lothian Ry. Co.*, 10 June 1835, 13 Sh. 887.

Case of the *Bon Accord Insurance Co.*

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Trustees are not liable unless they have completed a title to the shares by transfer and registration.

2332. In the next place, it is clear that a trustee is not personally liable as a contributory in respect of shares standing in the name of the truster, to which he, the trustee, has not made up a title. Thus, in a question as to the liability of the executors or other representatives of a deceased shareholder, the rule of law is undoubted—that where the shares are in the *hereditas jacens* of the deceased unconfirmed,—or where, although confirmation has been expedite, the shares stand untransferred in the name of the testator or constituent of the trustees,—the claim of the company is solely against the defunct's estate, and the obligation of the executor is to make the executry-estate forthcoming to the creditors.⁽ⁱ⁾ He can only incur personal liability by denuding of the surplus estate before satisfying the claims upon it. In the event of such a claim emerging after the surplus estate had been transferred to the heirs or beneficiaries, it is thought that a similar claim would lie against them, *i.e.*, to the extent to which they had derived benefit from the general succession.^(k)

Lumsden v. Buchanan.

2333. The rule according to which a trustee investing the trust-money in the stock of a mercantile company, or continuing the truster's investments after his death, is held to undertake a personal obligation to contribute towards the liabilities of the company, was, as already observed, finally established by the judgment of the House of Lords in *Lumsden v. Buchanan*.^(l) The principle of this rule is clearly and succinctly stated in the opinion of Lord Westbury; and the following passage, which we transcribe from that

(i) *Sturrock v. Thom's Exrs.*, 13 D. 762. The provisions of the Joint-Stock Companies Act upon this point seem to be declaratory of the common law. Trustees are not bound to take up a partnership; *Downs v. Collins*, 6 Hare, 418; and if they abstain from taking up the partnership interest, the estate of the deceased will be liable under the Act to the same extent to which the deceased would have been had he lived, and the executor will be liable only for a due administration; 19 & 20 Vict., c. 47, § 65; *Armstrong's case*, 1 De G. & Sm. 565; *Blakely's case*, 18 Beav. 138, and on appeal, 3 M'N. & G. 726; *Gowthwaite's case*, 3 M'N. & G. 187; *Crossfield's case*, 2 De G. M'N. & G. 128; and cases of *Drummond* and *Northumberland, etc., Bank*, *infra*. See also case of *Bon Accord Marine Ins. Co. v. Souther's Trs.*, *supra*, § 2315.

(k) In *ex parte Luard, re The Northumber-*

land and Durham District Bank, 29 L. J. Ch. 269, it was decided by the Lords Justices that, where stock had been transferred into the name of a married woman, to her separate use, the husband, and not merely the wife's separate estate, was liable to be placed on the list of contributories.

(l) *Lumsden v. Buchanan*, 22 June 1865, 4 Macq. 950; 3 Macph. H. L. 89, reversing 2 Macph. 695. Under the rule established in this case, liability attaches to *curators bonis* and other judicial officers as well as to private trustees; *Lumsden v. Peddie*, 16 Nov. 1866, 5 Macph. 84. In the leading case, one of the trustees, Dr Buchanan, who did not sign the contract of copartnership, was held not to have undertaken a personal liability. But the subscription of a transfer of shares has been held equivalent to signing the contract of copartnership; *Graham v. Western Bank*, 28 Feb. 1866, 4 Macph. 484.

opinion, appears to embrace all that is important to be known upon the subject:—"By the law of England, if an executor or trustee joins a partnership or company, for the purpose of investing or employing usefully part of the estate of the testator or of the trust, he is personally liable for all the consequences of his engagement; for the law assumes, and rightly, that he depended on the condition of the assets or trust-estate for his own security, and if he acted within the scope of his authority, he is left to seek his indemnity from the trust-estate or the beneficiaries. And this is both just and expedient. If it were held that persons entering into contracts with a trustee were really contracting, not with the individual, but with the trust-estate, it would be necessary to examine the state and amount of the trust-property and the powers of the trustee before any contract was entered into; and the like examination would be equally indispensable after the contract was made, for, as the trust-estate would be bound, it could not be dealt with or disposed of until the consequences of the contract were ascertained. The respondents in effect assert by their argument that, if trustees in Scotland enter into a contract on behalf of the trust-estate, they are not personally answerable for the consequences. I agree with the minority of the consulted judges that there is no such general rule. A trustee may, both in England and in Scotland, so limit and restrict any contract he may enter into as to exclude (as between himself and the other parties to such contract) personal liability. But this must be the result of express stipulation."(*m*)

2334. Trustees and executors, who wish to avoid personal liability as contributories, ought not to make up titles to shares standing in the name of their constituents. Where confirmation is requisite to give a title to a purchaser, it may be taken without risk of personal responsibility; but the shares ought to be transferred directly from the *hæreditas* of the truster into the name of the purchaser, the transfer being, if necessary, expressed to be with the consent of the trustees.(*n*)

How liability
may be avoided.

(*m*) 3 Macph. H. L. 98; 4 Macq. 955.

(*n*) In the case of the *Northumberland and Durham Bank, ex parte Dixon's Exrs.*, 1 Dr. & Sm. 225, executors who had received dividends, but whose names had not been entered on the list of shareholders, were held liable to be put on the list of contributories, but only *qua* executors, and for the purpose of operating by calls on the trust-estate. In *ex parte Drummond*, 2 Giff. 189, it appeared that trustees under a Scotch trust-disposition and settlement

were entitled to certain shares in the Royal Bank of Australia; but that the deed was not acted on for some years. The truster's eldest son took out administration to the personal estate in England, including the shares in question; and on the company being wound up, his name was placed on the list of contributories. Afterwards the trust-deed was set up by a decree of the Court of Session; and the Court of Appeal in Chancery ordered the names of the trustees to be substituted in the list

CHAP. LXXIII.

Effect of registration of the trustees under their collective designation.

2335. The liability of trustees as contributories may, of course, be limited by a special contract; that is, by a clause in the company's settlement expressly limiting the liability of trustees and executors, or by a special contract between the individual trustee on the one part, and the company, or those having authority to bind it in matters of this description, on the other. (o) With reference to the possibility of limiting the liability of trustees by special agreement, it deserves to be considered whether it would be effectual unless it were specially authorised by the contract of copartnery. It is to be observed that, although the directors of a joint-stock company have authority to bind the partners in such transactions with third parties as are within the scope of the company's business, it by no means follows that they have authority to limit the liability of purchasers of shares by the insertion of special stipulations to that effect in the transfers. (p)

Doctrine of the law of England.

2336. It appears that, in England, no doubt has ever been entertained as to the liability of a trustee or executor to be placed upon the list of contributories, in the absence of any special stipulation to the contrary. (q) The principle, that an executor, on becoming a

of contributories for that of the son. It appears that, in this case, the trustees had not been entered on the register of shareholders, and there was no question of personal, but merely of representative liability under the 65th section of the Statute.

The case of *Finlay, Hodgson, & Co. in re The Mexican & South American Mining Co.*, 27 L. J. Ch. 664, 4 Jur. N. S. 1030, illustrates the doctrine that liability attaches rather in respect of title than of interest. A London banking firm held 1453 scrip shares in the company, whereof 60 were in their own right, and 1395 for other persons. There was evidence that the directors knew that the bank were trustees to some extent, but were not aware of the particulars. There was no register of shareholders, and no deed of settlement. Sir John Romilly held that the bankers were to be put upon the list of contributories for their own shares, but not for those of their constituents. Here there was no question of liability *qua* trustees. The relation between the bankers and their constituents was a *simple resulting trust*; and the constituents were liable. In another branch of the same case it was determined that, where there was no deed of settlement or register, the test of liability, in the case of a partner holding scrip shares

in his *own* name, was the possession of the scrip; *ex parte Barclay*, 27 L. J. Ch. 660. *Finlay's* case, therefore, amounts to this, that where liability results merely from possession, the Court will inquire whether that possession was beneficial.

(o) The registered owner of shares may create a trust of the personal right to them by depositing the shares with a trustee in security, or for a special purpose. A transaction of this nature does not make the trustee liable as a contributor; for the trustee has only a *jus ad rem*, and not a property title to the shares, and is therefore not a partner; *Hall's* case, 1 M. & G. 307. We assume of course that the transaction is not collusive; that there is a *reversionary* interest remaining in the truster.

(p) *Davidson's* case, 8 De G. & Sm. 21; *Daniel's* case, 23 Beav. 568; *Nickoll's* case, 24 Beav. 639; *Davidson's* case, 4 Kay and Johns. 688.

(q) *Spence's* case, 17 Beav. 203; *Hall's* case, 1 M. & G. 307. In decisions under the Joint-Stock Companies Act of 1848, of which the above are instances, it appears that the placing of a party on the list of contributories was considered by the judges as a decision affecting his liability to co-partners. A party who was liable to the

partner, is responsible as such without limitation, was impliedly decided by Lord Eldon in *ex parte Garland*.^(r) Although the question there was with creditors of the trust, yet the principle was clearly laid down that the trust-estate was not liable, as it must have been had the trustees not been partners.^(s) The principle of this decision has been repeatedly affirmed in questions with creditors;^(t) and it is immaterial whether the trading was or was not authorised by the terms of the trust;^(u) whether the creditors had or had not notice that they were carrying on a trade as trustees for others;^(x) and whether they had or had not trust-funds in their possession.^(y)

2337. In other cases it has been held that the general estate of a truster was not liable for loss sustained in consequence of a portion of the estate having been invested in business; on the principle, that the engaging in trade was the trustee's individual act. It has been held that a testator may sever a part of his funds from the general estate, and authorise his trustees to invest it in business; and that such part of it will alone be liable for the obligations of the company.^(z) This appears to us to be rather a dangerous doctrine; since, by a slight extension of it, a purchaser might transfer his mining or bank stock into the names of trustees, by a deed *inter vivos*, and in so doing would be held to limit his liability to the value of the stock.

In what cases the trust-estate is liable to contribute.

2338. (7) It is scarcely necessary to prove by a formal citation of authorities that trustees are directly and personally liable to make reparation for injuries caused by their own fraud or negligence. It is to be observed, that in this class of cases the injured party has no recourse against the trust-estate, since the trustees are *ex hypothesi* not acting under the protection of their powers; for, of course, a trust can never, on any sound principle of construction, be held to give the trustees a license to commit injury or injustice. "It is quite obvious," observed Lord Cottenham in a leading case,

Liability of trustees for fraud or personal negligence.

In such cases damages cannot be recovered from the trust-estate.

public as a reputed partner, but who was not liable in a question with other partners, would not have been placed upon the list; *North of England Bank, ex parte Armstrong*, 1 De G. & Sm. 570; *Angas' case*, 1 De G. & Sm. 563. The principle upon which the liability to be placed as a contributory depends, under the 95-7th sections of the Act of 1856, is precisely similar; *per Turner, L. J.*, in *Luard's case*, 29 L. J. Ch. 271 cases of *Drummond's* and *Dixon's Exrs.*, noticed *supra*, § 2333, note; and Lord Westbury's dictum in *Lumsden v. Buchanan*, cited above.

(r) *Ex parte Garland*, 10 Ves. 110.

(s) 10 Ves. 118.

(t) See *Blakeley's Exrs.*, 13 Beav. 138, *per Lord Langdale*, and see 3 M'N. & G. 731; *ex parte Gowthwaite*, 3 M'N. & G. 199.

(u) *Lucas v. Beach*, 1 M. & G. 417.

(x) See *Downes v. Collins*, 6 Hare, 418; *Labouchere v. Tupper*, 11 Moore's P. C. Ca. 198.

(y) *Phené v. Gillan*, 5 Hare, 1.

(z) See Williams on Executors, 6th ed. p. 1656; *ex parte Garland, ut supra*; *ex parte Richardson*, 1 Buck, 202.

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In such cases damages cannot be received from the trust-estate.

“that it would be a direct violation in all cases of the purpose of the creator of any gift, or benefit, or charity, to provide out of the charity fund for the payment of damages from the improper acts of those who have the management of the fund. . . . The author of the gift, the creator of the charity, intended that the officers of the charity should have the fund confided to them, and he looked only to the trustees for the proper management and performance of the purposes of the trust. Whereas to give damages out of the fund would not be a purpose which the founder had in view, but would be a direct violation of the purpose for which the fund was intended.”(a) These observations were made in deciding an action in which damages were claimed against trustees in their fiduciary capacity, on the ground that they had refused to admit the pursuer to the benefit of the charity. The law lords were unanimously of opinion that the claim was untenable.

Personal liability for negligence.

2339. On the question of personal liability we shall refer to two cases, in one of which the action was laid upon legal fraud; in the other, upon negligence. The case of *Allan v. Kerr's Trustees*(b) was an action for reduction of a sale by trustees of stock in a banking company on the ground of fraudulent misrepresentation. The Court were of opinion that no relevant case had been made out against the trustees; that the alleged misrepresentations were those of the company; and that the trustees had no more knowledge of the company's affairs than any private shareholder, and were not responsible for its reports. But it was assumed by all the judges, that if the trustees had uttered any false representation as an inducement to the pursuers to make the purchase, they would have been liable personally, like any private shareholder, to make reparation.

Liability of trustees for the acts of their employees.

2340. The other case alluded to(c) raised the question of the liability of trustees for the acts of their employees. Mr Kinloch of Kinloch, as one of the trustees on the estate of Cronan, had let certain farms to the pursuer by lease, under which the proprietors were bound to make and maintain certain embankments for the purpose of protecting the estate against flooding. In consequence, as alleged, of operations upon the embankment, a portion of the property was flooded; and the tenant raised an action against Mr Kinloch, as an individual, claiming damages on the ground that the injury had been caused by the operations upon the embank-

(a) *Heriot's Hospital v. Ross*, 19 March 1846, 5 Bell, 87; see p. 46, and Lord Campbell's opinion, p. 56; also *Duncan v. Findlater*, there referred to.

(b) *Allan v. Kerr's Trs.*, 7 June 1853, 15 D. 725.

(c) *Hill v. Kinloch*, 1 March 1856, 18 D. 722.

ment performed under his directions. His defence was, that as the pursuer concluded against him only as a private individual, no action could lie against him without an averment that he had acted nimiously and recklessly.(d) The Court were unanimously of opinion that the pursuer would be personally liable for a breach of his obligation. On the principle of this case, it may safely be affirmed that private trustees carrying on a business attended with hazard would be personally liable to make reparation for any injury that might be sustained through the negligence of their subordinates, on the same grounds, and subject of course to the same limitations as those by which the liability of private individuals is regulated. But any sum paid as damages resulting from the fault of employees, assuming that the trustees had done their duty in the selection of competent persons, would be chargeable against the trust-estate in a question between the trustee and beneficiary.

2341. The liability of public trustees, acting under statutory authority, is determined by the decisions of the House of Lords in *Duncan v. Findlater* and *The Ministers of Edinburgh v. The Magistrates*. In the first of these cases it was decided that no claim lay against the funds of a road trust in respect of an injury sustained by a private individual using the road.(e) In the second case(f) it was ruled that the magistrates and town council were not liable in their corporate capacity to make reparation for the loss sustained by the ministers of the city, who were entitled to the proceeds of an assessment, in consequence of the magistrates having neglected to perform the duty of collecting the assessment in terms of their statutory powers. An opinion, however, was intimated, that the members of the corporation were responsible for the consequences of their personal negligence;(g) and an opinion to a similar purport was intimated by Lord Cottenham in *Findlater's* case, subject to the observation, that while the trustees kept within their powers, they would not be liable for any damage which their acts might occasion to other persons.(h) It would seem, therefore, that in the case of an injury resulting from the fault of employees of the trustees, unless the injured party can substantiate a claim against the surveyor or other person employed by the trustees, he will have no redress.(i)

Liability of
public trustees
for the acts of
their employees.

(d) *Irvine v. Tail*, 3 June 1808, M. "Deathbed," App. No. 1. see *Pearson v. Mags. of Montrose*, 1669, M. 13,098; *Innes v. Mags. of Edinburgh*, 1798, M. 13,189.

(e) *Duncan v. Findlater*, 28 Aug. 1839, M'L. & Rob. 911, reversing 16 Sh. 1150; (g) *Per* Lord Campbell, 6 Bell, 587.

New Clyde Shipping Co. v. River Clyde Trs., 16 July 1842, 4 D. 1521. (h) M'L. & Rob. 930; and see *British Plate Manufacturers v. Meredith*, 4 T. R.

(f) *Mins. of Edinburgh v. The Mags. of Edinburgh*, 27 July 1849, 6 Bell, 509. And 794; *Bolton v. Crowther*, 4 Dow. & Ry. 195.

(i) A different rule has been laid down

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Incompetent to award personal decerniture against trustees where action concludes against the body collectively.

2342. The judgment of the House of Lords in *Ross v. Heriot's Hospital* (*k*) decided an important point of practice with reference to personal actions, viz., that it is incompetent to pronounce decree against trustees personally under a summons the conclusions of which are directed against them in their fiduciary character. The conclusions of the summons were, that "in respect the pursuer has, in consequence of the repeated refusals of his said applications to be admitted to the benefit of the said institution, as before mentioned, suffered great hardship, loss, and damage, and his prospects in life have been seriously injured, the feoffees of trust and governors foresaid, defenders, ought and should be decerned and ordained, by decree of the said lords, to make payment to the pursuer of the sum of £500 sterling." Lord Cottenham observed, that though the pursuer did not expressly pray that the damages might be paid out of the trust-fund, the summons was so constituted that he could not get any damages except out of the trust-fund; and he was clearly of opinion that a personal decerniture was out of the question. (*l*) Lord Brougham's opinion is equally explicit. (*m*) Where, therefore, the object of a pursuer is to claim damages against a trustee personally for breach of trust, it is better that he should not be designed as trustee in the formal part of the summons. It is sufficient that the nature of the fiduciary relation should be set forth in the condescendence, along with the facts constituting the alleged breach of trust.

respecting the liability of magistrates in their corporate capacity. Corporations, it seems, are regarded not as trustees for the public, but as individual persons responsible for the consequence of their malfeasance; *Dargie v. Mags. of Forfar*, 10 March

1855, 17 D. 730; *Innes v. Mags. of Edinburgh*, 1798, M. 13,189.

(*k*) *Ross v. Heriot's Hospital*, 19 March 1846, 5 Bell, 87.

(*l*) 5 Bell, 46.

(*m*) 5 Bell, 51.

CHAPTER LXXIV.

LIABILITIES INCURRED BY TRUSTEES AND EXECUTORS TO THEIR CONSTITUENTS.

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| I. <i>Liability for Personal Negligence.</i>
II. ——— <i>in relation to Payment of Interest.</i> | III. ——— <i>for Co-trustees, and Limitation of Liability.</i>
IV. ——— <i>for Factors.</i> |
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2343. The subject of the present chapter has been to a large extent anticipated in treating of the duties and powers of trustees. Limits of the subject. As a general rule, the abuse of a power, or the omission to perform a duty, carries with it a commensurate liability to the beneficiary who has been injured by the breach of trust. The line of the trustee's duty, in the exercise of the various functions which devolve upon him, is marked out by the records of decided cases, in which the sanction of personal liability has been attached to divergence from that line. It would not have been possible to convey to the reader any adequate view of the obligations incumbent upon trustees, and the diligence which the law exacts from persons holding the office, without going into a detailed examination of the cases in which the nature of the duties incumbent upon the trustee has been determined by the application of that most rigorous of tests, the test of personal responsibility.

2344. Upon the subject of liability to the trustee's constituents in its general relations, and with reference to the acts of the individual trustee, our observations are therefore necessarily brief; being, in fact, little more than a summary of the results of previous chapters but regarded from a different stand-point—the interests of the trustee being at present the object in view, as were those of the beneficiary in the chapters on Duties and Powers. There remain behind the special topics of the liability of trustees and factors for interest on unproductive capital; the question of joint or individual responsibility in relation to the intromissions of co-trustees; and the doctrine of constructive liability for the intromissions of factors; including in the last two divisions the subject of the construction

(1) General relations of subject.

(2) Liability for interest.

(3) Liability for co-trustees;

(4) for factors.

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and effect of indemnity clauses. The subjects last mentioned are obviously susceptible of discussion in their more general relations; the grounds of constructive responsibility for the acts of other persons being manifestly independent, in a great degree, of the specific character of the duties omitted or acts performed by the defaulting administrator. These topics we shall accordingly discuss at greater length, and without reference to what has been said in previous chapters.

SECTION I.

LIABILITY FOR PERSONAL NEGLIGENCE.

Diligence prestable by trustees.

2345. In the determination of questions of liability, even as between trustee and beneficiary, very little aid is to be derived from general maxims. It has frequently been asserted—and we are not aware that the principle has ever been directly controverted—that the responsibility of gratuitous trustees under the law of Scotland was inferior in degree to the diligence prestable by mandatories according to the principles of the civil law; (a) but it is impossible to peruse the numerous decisions, in which personal responsibility has been enforced against gratuitous trustees under circumstances of hardship, without perceiving that the old partitions which separated the several degrees of *culpa* have been refined away to such an extent that the distinctions have no longer any practical bearing upon the actual questions which occur in regard to the administration of trusts. The doctrine of the limited responsibility of trustees, if it exists at all, holds good only in questions of liability for acts in which the trustee himself has not personally participated.

Uncertainty of the law as to responsibility for negligence.

2346. It is to be regretted that no effort has been made to lay down a distinct criterion of liability in regard to the responsibility of the trustee for negligence. If the rule of liability actually in operation is, as it seems to be, that of *strict* diligence, it were better for all parties that it should be authoritatively laid down and inflexibly applied. The trustee would then be put upon his guard; and if he did find himself involved in personal responsibilities in consequence of negligence, he would at least be spared the annoyance of a costly litigation, ending, as personal actions against trustees usually do end, in an award of damages, enhanced by a not inconsiderable accession to the debt in the shape of expenses. We proceed to recapitulate, in the briefest possible compass, the various

(a) Ersk. 3, 8, 36; Shaw's Bell's Com. 849. Mandatories were liable, according to the civil law, in exact diligence; Cod. lib. 4, tit. 35, l. 13.

acts of omission and intromission which may involve the trustee in personal liability. CHAP. LXXIV.

2347. Trustees are personally liable for neglecting to get in debts due to the estate ;(b) or for discharging a security, or consenting to the liberation of a debtor ;(c) but they are allowed a reasonable time to realise.(d) The fact that the trustee was interested as a beneficiary, and had no other object but to give time to the debtor to extricate his affairs, is not a sufficient defence. Liability or neglecting to realise.

2348. Trustees are liable to the beneficiary for loss sustained in consequence of having invested the funds committed to their care in a manner not sanctioned by the settlement.(e) This includes several cases :—(1) If the trustee invest his constituent's money in a mercantile business, in which he is partner, he is liable to account for a proportion of the profits of the business corresponding to the amount invested ; and if loss is sustained, or no profits earned, he must account for the money invested, increased by the addition of accumulated interest.(f) The same liability attaches if the trustee leaves the money in the business where it was invested without having special authority from the truster to do so.(g) (2) If the trustee invest the trust-money in a business in which he is not interested, or in the stock of an incorporated company ; or if, without authority, he leave the money so invested as he found it, beyond the period which may be fixed as being reasonably sufficient for winding up the affairs of the trust, he will (according to the general opinion of the profession, and on the principles laid down in the Liability for loss arising from investing trust-funds in trade ;

(b) *Moffat v. Robertson*, 81 Jan. 1834, 12 Sh. 369 ; *Forman v. Burns*, 2 Feb. 1853, 15 D. 362 ; *Gourlay v. Dumbreck*, 1710, M. 16,192 ; *Heggie v. Heggie*, 18 March 1858, 20 D. 828.

(c) *Abercrombie v. Innes*, 1723, Rob. Ap. Ca. 457.

(d) See *Baird's case*, 20 D. 1176.

(e) But the trustee is entitled to the equities of a *bona fide* possessor in relation to unauthorised investments ; and, *e.g.*, may take credit for money fairly expended in meliorations upon an estate which he had purchased with the trust-funds under an erroneous view of the meaning of the truster's directions ; *Douglas v. Douglas' Trs.*, 20 July 1864, 2 Macph. 1879.

(f) *Laird v. Laird*, 26 June 1855, 17 D. 984 ; *Cochrane v. Black*, 1 Feb. 1855, 17 D. 321 ; *Graham v. Keble*, 10 Nov. 1813, 2 Dow, 17. An authority to invest upon "personal security" will not justify

trustees in lending the money to a person in trade, as was observed by Sir William Grant in a case where trustees had lent to the husband of a beneficiary. "The authority," he observed, "did not extend to an accommodation ; it was evident the trustees had, upon the marriage, been induced to accommodate the husband with the sum, which they had no power to do ;" *Langston v. Ollivant*, G. Coop. 33. And where trustees were directed by the settlement to lend a wife's money to the husband on her requisition, it was held that his insolvency justified the trustees in refusing to comply with the request ; *Boss v. Godsall*, 1 Y. & C. Ch. Ca. 617. Lord Eldon would not even allow a trustee to invest in the stock of the Bank of England ; *Howe v. Earl of Dartmouth*, 7 Ves. 150. On the subject of liability for interest, see the ensuing chapter.

(g) *Guthrie v. Fairweather*, 1 Dec. 1853, 16 D. 214 ; *Laird v. Laird*, *supra*.

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cases of *Laird* and *Cochrane*, and the cases on heritable securities) be liable to replace the money, with interest, and to relieve the beneficiaries of any liabilities that may have been incurred to the creditors of the company.^(h)

or on hazardous security.

2349. (3) A trustee ought not to invest on foreign securities.⁽ⁱ⁾ (4) Trustees investing on personal security,^(k) bills,^(l) or personal bonds,^(m) are liable to replace the money with interest, or to pay such a sum as the beneficiary would have reaped if the fund had been invested on good heritable security, and the interest accumulated.⁽ⁿ⁾ (5) The same result will follow an investment on insufficient heritable security, such as postponed bonds with an insufficient margin, or bonds of annuity.^(o) (6) Trustees refusing to

^(h) See *Accountant of Court v. Baird*, 29 June 1858, 20 D. 1176; *Hughes v. Empson*, 22 Beav. 181; *Buxton v. Buxton*, 1 My. & Cr. 80; and *Orr v. Newton*, 2 Cox, 276, as to the question of reasonable delay for the purpose of realisation. There is no doubt that an English trustee also must account for profits, if required; *Tebbs v. Carpenter*, 1 Mad. 804. The rule established by the Court of Chancery on this subject is, that the beneficiary has the option of taking the actual profits or charging the executor with interest; *Robinson v. Robinson*, 1 De G. M'N. & G. 257; *ex parte Watson*, 2 V. & B. 414; *Docker v. Somes*, 2 My. & K. 655; *Heathcote v. Hulme*, 1 J. & W. 122; *Ratcliffe v. Graves*, 2 Ch. Ca. 152. A loan to an executor who is engaged in trade is regarded as an investment in trade, and liability for profits attaches accordingly; *Townend v. Townend*, 1 Giff. 201. The same construction is put upon the transaction if an executor who is in trade pay the trust-funds into his private bank account; *Treves v. Townshend*, 1 B. C. C. 384.

⁽ⁱ⁾ See *Blackett v. Gilchrist*, 30 May 1882, 10 Sh. 590; *Ferguson v. Menzies*, 21 May 1880, 8 Sh. 782; *Simpson v. Doud*, 1 Feb. 1855, 17 D. 815; *Acc. of Court v. Geddes*, 29 June 1858, 20 D. 1174. "Foreign Securities," when mentioned as a subject of investment in a power, may be held to include such securities as would be authorised by the courts of the country which the testator may be supposed to have had in view, and will therefore include the government stock of the state in view, but not the bonds of mercantile or local corporations; *Ellis v. Eden*, 23 Beav. 543. Foreign loans,

guaranteed by the British Government, have been held not to fall within the description of government funds in which trustees may legally invest; *Burnie v. Getting*, 2 Coll. 324.

^(k) *Anderson v. Small*, 12 Feb. 1833, 11 Sh. 382; *Watson v. Crawcour*, 9 June 1843, 5 D. 1182.

^(l) *Blain v. Paterson*, 28 Jan. 1836, 14 Sh. 361; *Ross v. Allan's Tr.*, 18 March 1850, 13 D. 44.

^(m) *Moffat v. Robertson*, 31 Jan. 1834, 12 Sh. 369.

⁽ⁿ⁾ See, in addition to the foregoing cases, *Morrison v. Miller*, 9 Feb. 1827, 5 Sh. 322, N. E. 299; *Sym v. Charles*, 13 May 1830, 8 Sh. 743; *Pollexfen v. Stewart*, 14 July 1841, 8 D. 1215; *Wellwood v. Ross*, 23 June 1831, 9 Sh. 790; *Gray v. Gray*, 4 June 1835, 13 Sh. 866.

^(o) *Acc. of Court v. Forsyth*, 28 Jan. 1853, 15 D. 345; *Murray v. Murray*, 30 May 1833, 11 Sh. 663. But see *Graham v. Hunter's Trs.*, 4 March 1831, 9 Sh. 543; *Thomson v. Christie*, 1 Macq. 236; *Train v. Bell's Trs.*, 26 May 1824, 3 Sh. 68, N. E. 44; *Bon Accord Ins. Co. v. Souter's Trs.*, 11 Dec. 1850, 13 D. 295. In *Raby v. Ridehalgh*, 7 De G. M'N. & G. 108, trustees were found liable for loss arising through an investment upon insufficient real security, which they had made at the request of a liferenter, with the object of increasing the immediate return. The Court gave no opinion whether an investment on mortgage was a legal investment according to the law of England. It has been held that trustees empowered to invest on mortgage may not lend to one of themselves, as all must exercise an impartial judgment as to the sufficiency of

invest in the funds or other investment sanctioned by the trust-deed, upon the requisition of the parties beneficially interested, will be held liable in damages equal to the rise in the value of stock in the interval. (*p*-)

2350. Trustees are not liable for the loss of the trust-estate by robbery, (*q*) fire, (*r*) or other casualty; and it would seem that a trustee is not liable as for negligence in not insuring against casualties. Money deposited in bank until a suitable investment is found, lies at the risk of the beneficiary, unless the bank was in bad credit, and the trustees were guilty of negligence in not withdrawing the deposit before the failure. (*s*)

2351. A different criterion of liability must be applied in judging of the conduct of trustees acting in pursuance of a power to embark the trust-money in speculative transactions; as, for example, to carry on a lease or a going business. In such cases the main duty of the trustee is not that of immediate realisation; and, as the interests of the business might be injured by the adoption of very rigorous measures against debtors, it has been held that the duty of the trustee in regard to the ingathering of debts is not the same as that of an executor, but is that which might be expected from a prudent man of business in the management of his own affairs. (*t*) The distinction to which we point is reflected in the law of evidence applicable to actions founded upon breach of duty. In actions against trustees in their character as executors, it lies upon them to show a reason for neglecting to use diligence. In the case of trustees carrying on a business, the *onus* of proving negligence lies on the pursuer. (*u*)

2352. Trustees authorised to invest upon personal security are clearly warranted in investing in the stock of incorporated mercantile companies; (*x*) but they are not entitled to *lend* the trust-funds, even to a beneficiary upon his own bill or acknowledgment. (*y*) An

the security; *Stickney v. Sewell*, 1 M. & Cr. 8. Where the funds are lent on a subsisting security, inquiry ought to be made as to its sufficiency.

(*p*) *Morrison v. Miller*, 9 Feb. 1827, 5 Sh. 822; *Sym v. Charles*, 18 May 1830, 8 Sh. 743.

(*q*) *Morley v. Morley*, 2 Ch. Ca. 2; *Jones v. Lewis*, 2 Vesey, 240.

(*r*) *Bailley v. Goold*, 4 Y. & C. 221, 9 L. J. Exch. Eq. 48.

(*s*) *Pearson v. Grierson*, 19 Nov. 1825, 4 Sh. 205; *Gibb v. Gibb*, 1769, M. 16,363; *Johnston v. Newton*, 11 Hare, 169, 22 L. J. Ch. 1039.

(*t*) See *Edmond v. Dingwall's Trs.*, 16 Nov. 1860, 23 D. 21; *Gill v. Earl of Fife's Trs.*, 8 July 1828, 2 Sh. 460, N. E. 412; *Kay v. Miln*, 4 Feb. 1830, 8 Sh. 487.

(*u*) *Cameron v. Anderson*, 12 Nov. 1844, 7 D. 92; *Miller's Trs. v. Miller*, 23 Feb. 1848, 10 D. 765; *Dundas v. Morrison*, 4 Dec. 1857, 20 D. 225, 228.

(*x*) *Per* Lord Moncreiff in *Seton v. Dawson*, 18 Dec. 1841, 4 D. 828.

(*y*) *Ross v. Allan's Trs.*, 13 Nov. 1850 13 D. 44; *Langston v. Ollivant*, G. Coop. 33; *Boss v. Godsall*, 1 Y. & C. Ch. Ca. 617.

Responsibility
for loss by fraud
or casualty.

Responsibility
for assets where
trustees em-
powered to con-
tinue hazardous
or speculative
investments;

where trustees
are authorised
to invest on per-
sonal security.

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authority to invest on personal security, fortified by a clause of indemnity, was held sufficient to protect trustees from liability for loss arising from an investment on a postponed heritable bond, with a collateral personal security in the shape of an assignment of a policy of life assurance.(z)

Liability in respect of erroneous payments.

Grounds of exemption from liability.

2353. As trustees are responsible for their intromissions, and bound to account to the party having the beneficial interest, they will be liable to replace money which they have inadvertently, or from error in fact or law, paid to one not entitled to receive it,(a) or whose interest was postponed to a preferable claimant.(b) The grounds on which they may claim to be exempt from the liability to make reparation are—that the payment was made to a party who was in possession of a legal title at the time, *e.g.*, by service or confirmation as heir of the destination, though it has afterwards been proved that he was not the heir; or secondly, that the mistake arose in consequence of the fault of the beneficiary himself in not claiming the bequest prior to the period of distribution, he being *sui juris* and cognisant of the settlement; or thirdly, that the claim is barred by long delay and acquiescence, whereby the trustee has been deprived of the means of obtaining relief from the party to whom the payment was erroneously made.(c)

Liability of executors paying before the expiration of six months from the death.

2354. To the same category of liability we may refer the rule according to which executors of an insolvent estate paying before the elapse of six months from the testator's death, or paying a creditor in full after the elapse of that period, when there is a deficiency of funds, are liable to other creditors for a dividend equal to that which the estate would have afforded had the distribution been made upon an equitable footing.(d) The discharge of a married woman *stante matrimonio* does not protect the trustees from liability for having paid to the husband without authority.(e)

Liability of trustees for acts in excess of their powers.

2355. Where trustees exceed their powers, as for example by

(z) *Graham v. Hunter's Trs.*, 4 May 1831, 9 Sh. 543. See, however, *Bon Accord Ins. Co. v. Souter's Trs.*, *supra*.

(a) *Mags. of Airdrie v. Smith*, 13 July 1850, 12 D. 1222; *Mayne v. M'Keand*, 4 June 1885, 13 Sh. 870; *Freen v. Beveridge*, 28 June 1832, 10 Sh. 727; *Gregory v. Anderson*, Robertson, Ap. Ca. 178; *Osburn v. Osburn*, M. 16,195.

(b) *Cruikshank's Trs. v. Cruikshank*, 24 April 1845, 4 Bell, 179; *Mackenzie v. Thomson*, 12 Nov. 1846, 9 D. 35; *Fraser v. Fraser*, 8 Dec. 1826, 5 Sh. 104, N. E. 96;

but see *Jeffrey v. Ure*, 21 June 1825, 1 W. & S. 565. In *Bankier v. Robertson*, 22 Feb. 1865, 8 Macph. 536, an executor was held bound to fulfil a promise to denude at a term which was antecedent to the period of vesting, the beneficiary undertaking to invest the money so as to keep the executor *indemnis*.

(c) See chapter 76 (Actions by Legatees and Beneficiaries).

(d) Chapter 63, section 8.

(e) *Mayne v. M'Keand*, *supra*; see *Ross v. Allan's Trs.*, 13 Nov. 1850, 13 D. 44.

selling the trust-estate without a power of sale, (*f*) or by incurring expense in parliamentary proceedings, (*g*) they have no claim against the beneficiary for the expense incurred in the execution of such acts. On the other hand, trustees would seem not to be liable for the non-exercise of a discretionary power, *e.g.*, for neglecting to demand security for the payment of marriage provisions. (*h*) In the case of a sale without authority being afterwards set aside at the instance of the beneficiary, they would be liable in damages to the purchaser without relief. (*i*) In fine, any manifest breach of duty, whether in the nature of a failure in performance or of an excess in the execution of powers, whereby the interests of the trustee's constituents are injured, will, in accordance with the doctrines of reparation, involve the trustee in personal liability. (*k*)

2356. With reference to the mode of enforcing liability, it would appear from the reported cases that the form of an action of accounting is the one most usually resorted to. But there are precedents for proceeding by action of damages and for granting an issue of damages in such cases. (*l*)

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Enforcement of Liability.

SECTION II.

LIABILITY IN RELATION TO PAYMENT OF INTEREST. (*m*)

2357. On the principle that every liquid debt, payment of which is unduly withheld, carries interest from the legal term of payment,

General rule stated.

(*f*) *Clelland v. Brodie*, 20 Nov. 1844, 7 D. 147; *Fleming v. Campbell*, 25 June 1845, 7 D. 985.

(*g*) *Myles*, 13 Dec. 1855, 18 D. 205; *Mackintosh's Trs. v. Mackintosh*, 30 June 1852, 14 D. 928; *Brown v. Adam*, 19 Feb. 1848, 10 D. 744.

(*h*) *Stark v. Moncreiff*, 7 June 1838, 16 Sh. 1114.

(*i*) *Mags. of Airdrie v. Smith*, 13 July 1850, 12 D. 1222.

(*k*) See *Morrison v. Miller*, 9 Feb. 1827, 5 Sh. 322.

(*l*) *Robertson v. Muckenzie*, 14 June 1854, 26 Jur. 498.

(*m*) The following note of a few of the leading English cases will suffice to show that the law of England, in reference to the subject of this section, is substantially identical with that administered by our own Courts:—

censurable or open to suspicion, is 4 per cent., or such higher rate of interest or profits as the trustee may have actually obtained (*Lewin on Trusts*, 5th ed., p. 276). In *Attorney-General v. Alford*, Lord Cranworth disapproved of charging a trustee with penal interest; and laid down the rule, that the interest to be charged against the trustee was that which he *had* or was *presumed* to have received, or which he *ought* to have received; 4 De G. M. & G. 852. This rule was adopted, *totidem verbis*, by V.-C. Wood in *Penny v. Avison*; 3 Jur. N. S. 62. But see Lord Cranworth's subsequent observations in *Mayor of Berwick v. Murray*; 7 De G. M. & G. 579. In such cases interest is not charged against the trustee or executor upon arrears of income, as this is a sort of accumulation; *Earl of Mansfield v. Ogle*, 4 De G. & J. 41; *Blogg v. Johnston*, 2 Law. Rep. Ch. 225.

2. Trustees investing the trust funds in trade are chargeable with interest at 5 per

1. The rate of interest usually charged, where the conduct of the trustee is not

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it follows that trustees chargeable with any unreasonable delay in the distribution or investment of the funds committed to their custody, will be liable in payment of legal interest for the time during which the money has been unnecessarily retained; and if, to the omission to invest there has been superadded a positive breach of duty, as by intromitting with and employing the money for their own profit, they will also be liable for such accumulations of interest as the fund would have yielded had it been properly invested.

Simple interest chargeable in respect of unreasonable delay.

2358. If a trustee be guilty of unreasonable delay in accounting for the funds in his hands to the beneficiary after the period of distribution has arrived, he will be charged with interest from the period at which the beneficiary ought to have been put into possession, even although, from the situation of the property, it has not actually been yielding a return.⁽ⁿ⁾ He is also liable in interest to the creditors of the trust-estate if he neglect to settle timeously,^(o) though it would appear that interest on debts is not exigible until a year after the testator's death; that being allowed as a reasonable interval for the collection and realisation of the assets.^(p)

Factors, etc., chargeable with interest, as upon an investment.

2359. Tutors, factors, and other judicial officers, are bound to deposit in bank all monies falling under their care as soon as received,

cent., unless the beneficiary elect to take a share of profits; *Robinson v. Robinson*, 1 De G. M'N. & G. 257; *Williams v. Powell*, 15 Beav. 461; *Att-Gen. v. Solly*, 2 Sim. 518; and see § 8348, *supra*. In the more recent cases, trustees under such circumstances have been charged with compound interest: *Jones v. Foxall*, 15 Beav. 388; *Williams v. Powell*, *supra*; see *Walker v. Woodward*, 1 Russ. 107; *Heighington v. Grant*, 5 My. & Cr. 258.

8. The Courts have a discretionary power to charge the trustee with 5 per cent. interest, either simply or with yearly rests, where there has been either a breach of an express direction to invest, or actual corruption or misfeasance amounting to a breach of trust; Lewin on Trusts, 5th ed., pp. 277-278. "Where," said Lord Eldon, "there is an express trust to make improvement of the money, if he will not honestly endeavour to improve, there is nothing wrong in considering him to have lent the money to himself upon the same terms upon which he could have lent it to others;" and accordingly he affirmed a decree awarding interest at 5 per cent. with half-yearly rests; *Raphael v. Boehm*, 11 Ves. 107.

The result of the English authorities was estimated by Sir J. Romilly in *Jones v. Foxall*, and embodied in three propositions:—(1) That if a trustee retained balances in his hands which he ought to have invested, he was chargeable with simple interest at 4 per cent. (2) That if, in addition to such retention, the trustee had committed a direct breach of trust, or had withdrawn the fund from a proper channel of investment, in which it was producing 5 per cent., he would be charged with interest after that rate. (3) That if he had employed the money in trade or speculation for his own benefit, he would be charged either with the actual profits or with interest at 5 per cent., with yearly rests, 15 Beav. 392.

(n) *Lord Lynedoch v. Ouchterlony*, 20 Nov. 1832, 11 Sh. 60; *Elphinstone v. Keith*, 1790, M. 4067.

(o) *Arbuthnott v. Arbuthnott*, 1758, M. 539; *Graham v. M'Nab*, 18 Nov. 1822, 2 Sh. 22.

(p) Bell's Com. 658. See *Cranstoun v. Scott*, 1 Dec. 1826, 5 Sh. 62, N. E. 57; *Elphinstone v. Keith*, *supra*; and see Chap. 68, sect. 3.

and to accumulate the interest thereon until a more productive investment can be obtained; and if they neglect this duty, they will be charged with the interest that would have accrued upon an investment. (q) For the same reason, if a trustee for behoof of creditors, (r) or upon a sequestrated estate, (s) is guilty of unreasonable delay in regard to the distribution of the estate, or neglects to consign a sum to meet unclaimed dividends, he must account for the money, with interest from the time the breach of duty commenced. But he is entitled to retain a reasonable sum in his hands for the purpose of defraying the costs of litigation, or other current expenses of the trust; and for this, of course, he cannot be charged with interest. (t)

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Trustees for behoof of creditors.

2360. We have already seen (u) that the employment of the trust-funds in business, or for the accommodation of the trustee, is a breach of duty entailing liability for the profits actually earned; the principle being, that the whole produce of the fund is to be restored, as if the investment had been expressly made for the benefit of the trust. (x) If, instead of directly investing the money in his business, the trustee, either personally or through his factor, simply retains it, or places the sum to the credit of his own bank account as the amount of profit resulting from the use of the money, cannot be exactly ascertained, the Court will exercise the option of either charging the trustee with the highest legal rate of interest, or with compound interest at a somewhat lower rate; 4 per cent. being the rate usually exacted. (y)

Liability for penal interest or profits upon money retained in the trustee's hands.

2361. The liability to penal interest on trust-money retained is not confined to those cases where the trustees may be supposed to have been influenced by personal motives, or in which the security of the estate is endangered. "A trustee," said Lord Colonsay, delivering the judgment of the Court in *Wellwood's Trs. v. Boswell*, (z) "who may also be acting as factor and agent for the trust, may be

Reason of the above rule.

Wellwood v. Boswell.

(q) 12 & 13 Vict., c. 51, §§ 5 and 87. See Act of Sederunt 13 Feb. 1730; Statute 1672, c. 2; *Mollison v. Murray*, 19 Dec. 1833, 12 Sh. 237; *Murray v. Murray*, 30 May 1838, 11 Sh. 663; *Cranstoun v. Scott*, *supra*; *Montgomery v. Wauchope*, 4 June 1822, 1 Sh. 453, N. E. 421; *Blair v. Murray*, 4 July 1843, 5 D. 1815; *Buchanan v. Mackersy*, 18 Feb. 1847, 9 D. 700.

(r) *M'Clymont v. Hughes*, 14 Feb. 1827, 5 Sh. 846, N. E. 321; *Campbell v. Keith*, 9 July 1840, 2 D. 1367.

(s) *Houston v. Duncan*, 20 May 1842, 4 D. 1220.

(t) *Ferrier v. Berry*, 8 July 1835, 13 Sh. 1081.

(u) See chapter 63, sect. 4.

(x) *Laird v. Laird*, 28 May 1858, 20 D. 973; *Cochrane v. Black*, 16 July 1857, 19 D. 1019; *Duke of Roxburghe v. Swinton*, 2 March 1824, 2 Sh. (Ap. Ca.) 18.

(y) *Campbell v. Keith*, 9 July 1840, 2 D. 1367; *Wellwood's Trs. v. Boswell*, *infra*, overruling *Fortune's Trs. v. Gillies*, 16 Nov. 1839, 2 D. 59; *Plaine v. Thomson*, 3 Dec. 1836, 15 Sh. 194.

(z) *Wellwood's Trs. v. Boswell*, 17 Dec. 1856, 19 D. 187, 194.

CHAP. LXXIV. a person of unquestionable wealth and of undoubted solvency, but it does not appear to the Court that they can make any distinction between such a case and that of a person of less reputed wealth and more doubtful solvency; for it appears to them that it is the only safe course to require that the trust-funds should be disposed of in a way which shall separate them from the proper funds of the person so managing them; and it is easy to do so by having a separate bank account, in which the trust-funds will be deposited, and be accessible at all times." In that case, the factor to a trust had inadvertently allowed the balance of trust-money in his hands to enter his private account, the estate having been at times indebted to him for advances. The Court, in the circumstances of the case, allowed interest to be charged on the annual balances at 4 per cent., such interest to be added to the yearly balance. (a) If trustees have *de facto* accumulated the proceeds of a special trust-fund put to a profitable employment, the amount of the accumulated sum will, on the principles above explained, represent the debt due by them to the beneficiary. (b)

The rule of strict accounting applies to trusts as well as to factories.

Montgomerie v. Wauchope.

2362. The decision in *Wellwood's Trustees* is of some importance, because it has distinctly imported into the administration of trusts the principle of liability previously established by the Court in their official superintendence of the transactions of factors and guardians. Prior to the institution of the proceedings in the case of *Montgomerie v. Wauchope*, the notions prevalent in the profession, and with the judges of the Court of Session, concerning the accountability of factors were extremely vague, and fraught with injustice to the pecuniary interests of the unfortunate persons whose estates were subject to judicial management. The attention of the Court of Session was then recalled to some important principles intimately connected with the theory of fiduciary administration, which would appear to have slept in the text-books since Lord Thurlow's famous decision in the case of the *York Buildings Company v. Mackenzie*. Among the questions put to the judges under the remit from the House of Lords of 8th April 1816, the following are more immediately deserving of consideration in connection with the present subject:—"3. Is the mode of accounting ordered by the interlocutor of the First Division, of 2d July 1812, as between Lord and Lady Montgomerie and Mr Wauchope, agreeable to the law of Scotland? 5. In particular, is Mr Wauchope, by the law of Scot-

(a) 19 D. 194. And see *Ross v. Macgregor*, 15 Feb. 1856, 18 D. 611, where interest was accumulated with the principal at the date of citation.

(b) *Torrie v. Munsie*, 31 May 1832, 10 Sh. 597.

land, bound to account for the actual profits which he may have derived by the balances which at any time remained in his hands?" CHAP. LXXIV.

2363. The Court had previously found that Mr Wauchope, the factor, was chargeable with 5 per cent. interest upon his annual balances, but not with interest on receipts *de die in diem*; but upon reconsidering the case, they determined that, although not liable for actual profits, he ought, in the circumstances, to be charged with interest at 3 per cent. *de die in diem* to the end of each year, and that, within three months after closing each year's accounts, he should be considered as bound to have lent out on securities, bearing 5 per cent. interest, such part of the actual balances in hand as was consistent with the probable exigencies of the estate, and to be chargeable accordingly. (c) Five per cent. interest, with annual accumulations, has accordingly been adopted in subsequent cases as the rule of accounting, where factors have neglected the duty of investment; (d) although in some exceptional cases, where the factor had acted as banker in making advances to the estate, a lower rate of interest has been awarded. (e) Judgment of the Court.

2364. Where the charge against trustees amounts to no more than a want of discretion, shown in unduly deferring the settlement of claims, without having derived personal benefit from the delay, or where there has been remissness on the part of the claimant, the Court has modified the rate of interest to 4 per cent., (f) or even to bank interest, together with such accumulations of interest as might have been actually received. (g) Where trustee is only chargeable with want of discretion, interest restricted to 4 per cent.

2365. Where, on the other hand, the trust-funds have been lost in consequence of culpable negligence on the part of the trustees, —as, for example, by lending money on insecure investments, or by neglecting to superintend the intromissions of their factors,—the claim has uniformly been for payment of the principal sum with legal interest; or, which is substantially equivalent, the lost Legal interest exigible when there has been culpable negligence.

(c) *Montgomery v. Wauchope*, 1 Sh. 453, N. E. 421; 8 April 1816, 4 Dow, 109; *Queensberry's Exrs. v. Tait*, 23 May 1822, 1 Sh. 428, N. E. 398.

(d) *Cranstoun v. Scott*, 1 Dec. 1826, 5 Sh. 62, N. E. 57; *Blair v. Murray*, 4 July 1843, 5 D. 1315; *Buchanan v. Mackersy*, 13 Feb. 1847, 9 D. 700; *Duke of Roxburghe v. Swinton*, 2 Mar. 1824, 2 Sh. (Ap. Ca.) 18.

(e) *Condie v. M'Donald*, 20 Nov. 1834, 13 Sh. 61; *Roberts v. Mackintosh*, 24 Jan. 1833, 11 Sh. 314; 5 June 1835, 13 Sh. 877; *Lambe v. Ritchie*, 14 Dec. 1837, 16 Sh. 219.

(f) *Lynedoch v. Ouchterlony*, 20 Nov. 1832, 11 Sh. 60.

(g) *Houston v. Duncan*, 20 May 1842, 4 D. 1220; *Williamson v. Suttie*, 20 July 1843, 15 Jurist, 637; *Campbell v. Keith*, 9 July 1840, 2 D. 1367. In the recent case of *Douglas v. Douglas' Trs.*, 7 June 1867, 5 Macph. 827, trustees who had invested contrary to the directions of the settlement, under an erroneous view of its meaning, and in *bona fides*, were held liable to account only for the actual proceeds of the estate to the date of the decree fixing the true meaning of the settlement, and for interest at four per cent. thereafter.

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money has been objected to as an item of credit in the trustees' accounts. In no instance, among the numerous cases of defalcation that have occurred within the last thirty years, has interest been refused when demanded; although, from the omission of any mention of interest in some of the reported decisions, it may be inferred that the claimants had abstained from pressing for interest against the trustees. In *Ross v. Allan's Trustees*,^(h) the interlocutor of the Lord Ordinary, which was adhered to, expressly gave interest from a date up to which the produce of the investment had been accounted for to the satisfaction of the beneficiary; and in *Blain v. Paterson*⁽ⁱ⁾ the interlocutor of the Court, which gave interest only to its date, reserved to the parties all their claims for past interest, so far as not paid, against the defender. In other cases, where the conclusions of the action were for repetition of the misappropriated money, with interest, the Court gave decree in terms of the summons, or found the trustees bound to account for the money as if they had invested it.^(k)

Accumulated interest due where the trustee has acted fraudulently or in breach of the trust.

2366. Where trustees have disregarded express directions to invest the funds in particular securities, as, for example, landed property^(l) or foreign securities,^(m) they have been held liable to payment, in addition to the capital, of a sum equal to the dividends or annual produce which might have been realised by means of the required investment.

Whether interest due by trustee on assets never recovered.

2367. Where a fund has never been recovered by trustees, but has been inexcusably left outstanding, and lost, the Court of Chancery, as Mr Lewin informs us, contents itself with holding the trustees liable for the principal, without obliging them to account for it as a productive fund.⁽ⁿ⁾ We are not aware that this exception to the ordinary rule of liability for interest has been sanctioned by our Courts; although, from the brevity of some of the reports, it has not always been possible to discover whether interest was intended to be included in the decerniture fixing liability upon the trustees.^(o)

^(h) *Ross v. Allan's Trs.*, 13 Nov. 1850, 13 D. 44, 46.

⁽ⁱ⁾ *Blain v. Paterson*, 28 Jan. 1836, 14 Sh. 361, 374; and also in *Kennedy v. Wightman*, 28 June 1827, 5 Sh. 852, N. E. 792.

^(k) *Anderson v. Small*, 12 Feb. 1833, 11 Sh. 382; *Seton v. Dawson*, 18 Dec. 1841, 4 D. 310; *Mollison v. Murray*, 19 Dec. 1833, 12 Sh. 237; *Murray v. Murray*, 30 May 1833, 11 Sh. 668. See *Greive v. Amos' Exrs.*, 24

June 1835, 13 Sh. 973; *Donaldson v. Kennedy*, 18 June 1838, 11 Sh. 740.

^(l) *Pollexfen v. Stewart*, 9 Dec. 1841, 4 D. 224.

^(m) *Sym v. Charles*, 18 May 1830, 8 Sh. 741, 743.

⁽ⁿ⁾ Lewin on Trusts, 5th ed. p. 279.

^(o) See *Moffat v. Robertson*, 31 Jan. 1834, 12 Sh. 869; *Forman v. Burns*, 29 Jan. 1853, 15 D. 362.

SECTION III.

LIABILITY FOR THE ACTS OF CO-TRUSTEES, AND LIMITATION OF LIABILITY.

2368. I. LIABILITY AT COMMON LAW AND UNDER THE TRUSTEE ACT. (*p*)—It has been laid down by Professor Bell, that trustees are jointly responsible for the intromissions of any of their number, unless in so far as the truster, for himself and for those on whom he has bestowed the beneficial interest, shall have dispensed with this responsibility, and limited each trustee's obligation to the amount of his own actual intromissions. (*q*) But the cases cited by the learned author (*r*) do not bear out his proposition; and, on principle, it may be affirmed that trustees, as joint mandatories under a gratuitous contract, are only liable at common law for their own intromissions or culpable omissions, and for the obligations of co-trustees to the extent to which they have authorised them, either expressly or by acquiescence. The rule of liability is so laid down by Mr Erskine in a passage where, after stating the rule of the civil law according to which mandatories were liable in exact diligence, he explains that, as regards trustees, including in that category both depositaries and gratuitous mandatories, the law of Scotland holds the trustee liable only in that degree of diligence which is suitable to the nature of the contract. "Our judges," he concludes, (*s*) "have therefore governed themselves on this point by the equity of the Roman law, as it has been already explained; by which a mandatory in a proper mandate, where no benefit accrues to him, is liable only for *actual intromissions*, or for such diligence as he employs in his own affairs." (*t*)

Whether trustees are liable in a joint responsibility.

(*p*) In many of the cases on liability it will be observed that the defaulting trustee had the powers of a factor; so that the responsibility of his colleagues was partly that of co-trustees, and partly that arising from the obligation to appoint a solvent and trustworthy person as factor. Although all these cases have been cited in the present section, some of them are more fully commented on in the following section, to which accordingly we beg to refer the reader.

(*q*) Bell's Prin. § 2000, 6.

(*r*) *Dalrymple v. Murray*, 1784, M. 16,210, 8534; *Sym v. Charles*, 13 May 1830, 8 Sh. 741; *Wallace v. Taylor*, 23 Feb. 1832, 10 Sh. 364.

(*s*) Ersk. 3, 8, 36, and cases there cited,

viz., *Earl of Wemyss v. Thomson*, 1672, M. 8515; *Sutherland v. Ross*, 1683, M. 3516; *Irving v. Irving*, 1701, M. 8517; and see Stair, 1, 12, 10; Bankt. 1, 18, 11. This rule may be held to be fixed by the decision of the First Division in the case of *Thomson v. Campbell*, 16 Feb. 1838, 16 Sh. 560, noticed *infra*, § 2396.

(*t*) The principle, that a trustee is not liable for the acts or defaults of his co-trustee, was established in England by a decision in the reign of Charles I., which has ever since been considered a leading authority; *Townley v. Sherborne*, 2 Wh. & T. L. Ca. 3d ed. p. 778. But in consequence of the qualifications with which the rule is now received, it must be admitted that it does not afford any very substantial

2369. The application of the rule is very well illustrated by*Scott v. Gray.*

protection to trustees. The qualifications we refer to are these:—(1) If injury result to the estate from the act or default of one of two co-trustees, and if the loss might have been prevented by the other, his negligence is a sufficient ground for subjecting him in liability; *Mucklow v. Fuller*, Jac. 198. (2) A trustee who joins in a receipt is *prima facie* considered as having received the money; *Brice v. Stokes*, 11 Ves. 819, 2 Wh. & T. L. Ca. 8d ed. p. 785. These limitations of the general rule of non-liability were introduced by Lord Eldon in the cases above referred to.

1. A leading case on liability for the acts of co-trustees by reason of negligence is *Booth v. Booth*, 1 Beav. 125. The testator bequeathed his personal estate to his partner and another executor in trust, for the benefit of his wife and family. They accepted and proved the will. The partner was allowed to retain the testator's money in the business, in consequence of which it was lost. Lord Langdale, M.-R., held that the co-executor, by proving the will, had undertaken the trust and the duty of performing it, and was therefore liable for the consequences of his omission. "The executor," said his Lordship, "unfortunately did not consider that by proving the will he had undertaken any duty or incurred any responsibility. He says he proved the will in consequence of the request of the widow, who informed him that he would not thereby undertake any duty, or be responsible for anything. It is important that it should be known that no one can safely act in that manner, and that the law will not permit a party to neglect the duty which, by proving the will, he has undertaken;" 1 Beav. 129. See also *Dix v. Burford*, 19 Beav. 409.

Again, if an executor remains passive, and allows his co-executor to receive the assets, and retain them in his hands instead of investing them in proper securities, he is liable for the consequences of his neglect of duty, as if he had permitted the breach of trust; *Styles v. Guy*, 1 M.N. & G. 422. Observing upon the duties of executors, Lord Cottenham said, "Of these duties a principal one is, to call in and collect such parts of the estate as are not in a proper state of investment. If he

knows, or has the means of knowing, that part of the estate is not in a proper state of investment, but is held upon personal security only, and not necessarily so for the purposes of the will, is it not part of the duty which he has undertaken to interfere, and take measures, if necessary, for putting such property in a proper state of investment; or is it no part of his duty, because the property is in the hands of a co-executor, and not of any stranger to the estate? It is impossible to find any principle for any such distinction;" 1 M.N. & G. 431; see also *Egbert v. Butter*, 21 Beav. 560; *West v. Jones*, 1 Sim. N. S. 205.

2. With respect to receipts, a distinction is taken between the case of co-executors and co-trustees. Any one executor in England is competent to give a discharge; and therefore, if another executor, who does not actually receive, joins in the discharge, he is to be considered as assuming a power over the fund, and is therefore answerable for the application of the money; *per* Lord Eldon in *Brice v. Stokes*, 11 Ves. 819. If, however, one executor has already received the money, the subsequent execution of a discharge by the co-executor has been said to be unnecessary, so that the executor is not liable for merely signing a document which has no legal effect; *Westley v. Clarke*, 1 Eden, 857; *Joy v. Campbell*, 1 Sch. & Lef. 841.

An executor, it is held, is not safe in relying upon the representation of his co-executor that the money is wanted for the purposes of administration; for it is part of his duty to make himself acquainted with the situation of the trust affairs; *Lord Shipbrooke v. Lord Hinchinbrooke*, 11 Ves. 252, 16 Ves. 477; *Underwood v. Stevens*, 1 Mer. 712. The executor, in the event of proceedings being taken, is of course entitled to an inquiry how far the funds have been profitably applied; *Williams v. Nixon*, 2 Beav. 472; *Heritt v. Foster*, 6 Beav. 259.

3. As regards trustees, it was held, in some of the older cases, that as all the trustees must subscribe to make an effectual receipt, there was room for the inquiry whether any of them had not signed for the sake of conformity; *Fellows v. Mitchell*, 1 P. Wms. 81; *Brice v. Stokes*, *supra*.

the recent case of *Scott v. Gray*,^(u) which was an action against assumed trustees under a contract of marriage on the ground of their omission to complete a title in their persons to certain securities assigned by the marriage-contract, whereby the value of the securities was lost to the trust-estate. It appeared that the trust had been in existence for seventeen years prior to the assumption of the trustees against whom the action was brought. The Court was of opinion that it was impossible to hold the trustees guilty of gross negligence for merely taking for granted that the original trustees had performed so necessary and so simple a duty as that of completing a title to the subjects; and that the action virtually resolved into an attempt to make the assumed trustees liable for the faults of their co-trustees. The action was accordingly dismissed.

2370. By the Trustee Act, 1861, the object of which was, as we understand, to declare, and, where necessary, to restore, the common law in regard to the office of trustee, it is enacted that all trusts constituted by virtue of any deed or local Act of Parliament under which gratuitous trustees are nominated, shall be held to include, unless the contrary be expressed, a provision "that each such trustee shall only be liable for his own acts and intromissions, and shall not be liable for the acts and intromissions of co-trustees, and shall not be liable for omissions." Where, therefore, one trustee is sought to be made liable for the obligation of another,—whether resulting from contract, from *culpa*, or from misfortune, *e.g.*, in the case of insolvency,—the question always is, whether the trustee against whom liability is sought to be enforced has been a party to the obligation.^(v)

Limitation of
liability by the
Trustee Act.

The principle involved in such an inquiry is obviously unsound; for a trustee has no right to join in any act for the sake of conformity; he is bound to see to the application of the money, and ought to be answerable for the omission. Accordingly, in the later English cases, the broad principle has been recognised, that the signing a discharge implies receipt of the money, and is an act of intromission. See *Thompson v. Finch*, 22 Beav. 316, where one subscribing trustee invested the money in improper securities, and the other was held liable; *Hanbury v. Kirkland*, 3 Sim. 265, where liability was incurred in consequence of the co-trustee having absconded with the trust-funds in his possession; and *Wilkins v. Hogg*, 31 L. J. Ch. 41, cited *infra*, § 2388, where the true principle

of liability was laid down by Lord Westbury.

^(u) *Scott v. Gray*, 26 Nov. 1862, 1 Macph. 57; *Dawson v. Stirton*, 4 Dec. 1863, 2 Macph. 196; *Fulton v. Fulton*, 21 March 1864, 2 Macph. 893.

^(v) 24 & 25 Vict., cap. 84, § 1; 26 & 27 Vict., cap. 115. By the Scottish Statute 1696, cap. 8, the appointers of tutors-nominate were, on considerations of expediency, empowered to limit the liability of their appointees in a similar manner. The Statute narrates, "That tutors-nominate by a father to his children are persons in whom he reposeth the greatest trust; and that the tutors-nominate frequently decline the office, being unwilling to subject themselves to the hazard of omissions, of being obliged, *in solidum*, each of them for

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Responsibility
for the contracts
of co-trustees.

2371. First, as to contracts. It was determined, as we have elsewhere shewn, by the judgment of Lord Eldon, affirming that of the Court of Session, that in the case of contracts with third parties those trustees who actually contracted are alone responsible. (x) The principle of this decision must, we think, be held to determine any collateral question of liability to the beneficiary in respect of injury that he may sustain through the trustees' contract.

Trustees are not
jointly respon-
sible for fraud.

2372. Again, with reference to liability for fraud or gross mismanagement, the recent decisions upon the liability of bank directors clearly establish the proposition, that reparation for a breach of trust is only exigible from a person holding a fiduciary position in respect of his own personal acts, or such acts of his colleagues or subordinates as he has either adopted or directly authorised. (y) These decisions have an important bearing on the present question; for, obviously, the liability of a gratuitous trustee cannot be greater than that of a director. Where fraud or gross negligence is concerned, distinctions founded on the character of the contract disappear. *Culpa tenet suos auctores*; and liability attaches to all who participate in the breach of trust, whether occupying the position of trustees or of salaried managers or directors.

Liability of
trustees in re-
spect of their
subscriptions to
receipts.

2373. But the class of cases with which we are mainly concerned are those that occur where trust-money is uplifted or trust-estate is reduced into possession by a trustee, upon the receipt of the whole body or a quorum, or with their acquiescence, and liability is attempted to be enforced against the consenting trustees, as constructive intromitters, or as parties to the fraud of the trustee to whom the money was paid. One principle applicable to such cases is, that the signing of a receipt is an act of intromission; and therefore, if the subscribing trustees have been negligent of

others;" and provides, "that it is and shall be lawful for the father, by any act or deed in his *liege poustie*, to make a nomination of such persons as he thinks fit to be tutors, and of such persons as he thinks fit to be curators to his children, during their minority, containing this provision and quality that the said tutors or curators shall not be liable for omissions, but for their actual intromissions with the means and estate descending from the father, and other deeds of administration thereanent; and that each of them shall only be liable for himself, and not *in solidum* for others," etc. Where trustees are also appointed tutors and curators, it is essential that the limitation of liability should be inserted in the deed of the tes-

tator, if it is desired that they should have the benefit of the statutory protection. And in any circumstances it is proper that gratuitous trustees should have all the protection which the amplest indemnity clause can give them.

(x) *Higgins v. Livingstone*, 1 July 1816, 6 Pat. 244. See also *Fairlie v. Neilson*, 18 Dec. 1821, 1 Sh. 222, N. E. 211; *Murray v. Campbell*, 28 Nov. 1827, 6 Sh. 147.

(y) *Western Bank* cases, 19 March 1862, and 16 Feb. 1861, 23 D. 561; *National Exchange Co. v. Drew*, 27 July 1860, 23 D. 1; *Cullen v. Johnston*, 16 Feb. 1861, 23 D. 574; *Davidson v. Tulloch*, 23 Feb. 1860, 3 Macq. 783; but see *Orr v. Glasgow, Airdrie, & Monklands Ry. Co.*, 24 April 1860, 3 Macq. 799.

their duty, *e.g.*, by leaving the money in the hands of a colleague, they cannot defend themselves against a personal action on the ground that they had not intromitted. (z) CHAP. LXXIV.

2374. The further question then arises, whether the subscribing trustees (assuming that they are chargeable in the first instance with the money which was paid to them on their receipt) can discharge themselves by alleging that they had paid it over to their co-trustee, to be applied by him towards the purposes of the trust. The answer is, that they are bound to see that he so applies it. If, therefore, the money has been allowed to remain in his hands or subject to his control for any considerable time, the other trustees are answerable for any loss accruing through his insolvency or otherwise. (a) But if the custody of money is temporarily intrusted to one trustee for a specified purpose, as, for example, for distribution amongst legatees or creditors, (b) or is received by a trustee or factor in the ordinary course of management, (c) and the trustee becomes insolvent or absconds before the money has been in his hands for such a length of time as would give rise to suspicion, or put the other trustees upon inquiry as to the manner in which their commission has been executed, there is then no negligence, and therefore no joint liability.

Whether liability attaches where money intrusted to co-trustee for specified purposes.

2375. The defence, that the money was intrusted to one trustee for a special purpose, and not in the way of a general delegation of the trust, is not *per se* sufficient; for it is the duty of all the trustees to see that their directions are obeyed. Accordingly, where trustees paid over a sum of money to one of their number in order that he might invest it in the purchase of American stock in the names of certain parties, as directed by the trust-settlement, and on inquiry being made some years after it was found that the money never had been invested, and the acting trustee was insolvent,—the trustees who had joined in granting the receipt, when the original investment was called up, were held responsible for the loss. (d)

Liability may attach if trustees neglect to see to the application of the money.

2376. In the case of a joint appointment of trustees for behoof of creditors, if both trustees accept, and allow their names to be used in proceedings for vesting the bankrupt's estate in their persons, they are held to have intromitted jointly; and if, through the negligence of one of their number, his colleague is allowed to get

Liability where management delegated to the defaulting trustee.

(z) *Seton v. Dawson*, 18 Dec. 1841, 4 D. D. 1142; *Ainslie v. Cheape*, 6 Feb. 1835, 310; *M'Clymont v. Hughes*, 14 Feb. 1827, 13 Sh. 417, see Lord Corehouse's note. 5 Sh. 346, N.E. 321.

(a) *Ibid.* *Blain v. Paterson*, 28 Jan. 16 Sh. 560. See *M'Nair v. Broomfield*, 24 1836, 14 Sh. 361; *Moffat v. Robertson*, 31 June 1830, 8 Sh. 969.

Jan. 1834, 12 Sh. 369. (d) *Sym v. Charles*, 13 May 1830, 8 Sh.

(b) *Urquhart v. Brown*, 7 June 1843, 5 711.

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possession of the entire estate, and becomes insolvent, the co-trustee is liable, on the principle above explained. (e) *A fortiori*, if one of a body of trustees is allowed to get possession of the funds upon the receipt of the whole body, and they leave the entire management in his hands, neither attempting to reclaim the funds nor to check his accounts, they will be liable as intromitters in the event of a deficiency. (f)

Liabilities of
executors and
assumed trust-
tees.

2377. The liability of executors appears to be the same as that of testamentary trustees. In several of the cases cited above the trustees were also executors. (g) While it is clear beyond doubt that an assumed trustee cannot be liable for the defaults or erroneous payments made by his predecessors in the trust, (h) it would seem that the representatives of the latter may be reached through an action directed against the assumed trustee. And so, if an order is pronounced upon an assumed trustee to consign a sum which had been misapplied prior to his acceptance, he may compel the representatives of his former colleague, by an action in his own name, to implement the order for consignment, as well as to relieve him of the expense of defending the principal action. (i)

Joint liability of
tutors under the
Statute 1672.

2378. Tutors neglecting to make up inventories are liable, under the Statute of 1672, *singuli in solidum*, and for omissions as well as intromissions. (k) Trustees, therefore, who expressly accept the office of tutors, may incur penal liability in terms of the Statute; (l) but if they are only liable on a general acceptance of a deed in which they are appointed tutors and curators as well as trustees, it is thought that their title as trustees would be sufficient to shield them from liability, in an action founded on the assumption that they had acted as tutors without authority.

Example of a
clause restrict-
ing the liability
of trustees.

2379. II. CONVENTIONAL LIMITATION OF LIABILITY.—For the more effectual protection of trustees against liability for omissions, or for the default of their co-trustees and factors, an express clause of indemnity is usually inserted in the trust-settlement. An example of such a clause will be found in the Juridical Styles. It is as follows: “And I hereby declare that my trustees shall nowise be liable for any omissions in management, nor for the omissions and neglects of their factors, agents, or cashiers, nor for the re-

(e) *M'Clymont v. Hughes, supra.*

(f) *Seton v. Dawson, Blain v. Paterson, supra.*

(g) See, in addition, *Carruthers v. Hall*, 25 Nov. 1880, 9 Sh. 66.

(h) *Scott v. Gray*, 26 Nov. 1862, 1 Macph. 57; *Fulton v. Fulton*, 21 March 1864, 2 Macph. 893.

(i) *Ogilvie v. Boswell*, 24 May 1850, 12 D. 940; 15 July 1856, 19 D. (Ap. Ca.) 7.

(k) *Murray v. Murray*, 30 May 1833, 11 Sh. 663.

(l) As to the statutory limitation of the liability of tutors, see the Act 1696, cap. 8, quoted *supra*, § 2870, note; *Moffat v. Robertson*, 31 Jan. 1834, 12 Sh. 369.

sponsibility of them or their cautioners, if caution shall be required, or for the responsibility of the debtors, purchasers, or others, with whom my trustees may transact; but that they shall only be bound to act honourably, and shall nowise be liable *singuli in solidum*, or for one another, but each for himself only, and for his own personal intromissions or wilful default, and no further.”(m)

2380. A similar clause, but more anxiously expressed, has been usually inserted in English trust-deeds; and by Lord St Leonards’ Act every instrument creating a trust is now deemed and taken to include an indemnity clause in the usual form, as specified in the Act; (n) which provides, in substance, that trustees shall be respectively chargeable only for such monies as they shall respectively receive, notwithstanding their signing any receipt for the sake of conformity; that they shall be answerable for their own acts and defaults, but not for any banker or other person with whom monies or securities may be deposited, nor for the insufficiency of securities, nor for any other loss, unless happening through the trustees’ own wilful default. The terms of the indemnity clause of the Scotch Trustee Act, as already observed, are, “That each such trustee shall only be liable for his own acts and intromissions, and shall not be liable for the acts and intromissions of co-trustees, and shall not be liable for omissions.”(o)

English clause of indemnity held to be incorporated with new trusts.

2381. With reference to the English clause of indemnity, Mr Lewin observes, (p) that while it informs the trustee of the general doctrine of the Court, it adds nothing to his security against the liabilities of the office; for, as equity infuses such a proviso into every trust-deed, the expression of the doctrine of the Court can give the trustee no greater immunity than if it had been left to implication. If we are right in the views expressed in the preceding pages respecting the liability of trustees under the law of Scotland, it would seem that the usual clause of indemnity in Scotch deeds is merely declaratory of the legal doctrine of liability,—an opinion in which we are supported by the late Mr Duff, who observes, (q)—“There appears, indeed, to be no real difference in a

The ordinary indemnity clause does not seem to add anything to the security of trustees.

(m) Juridical Styles, 4th ed. 1, 245. See similar clause exempting tutors and curators from the statutory liability, p. 270; Duff on Deeds, 172. In any clause of exemption of tutors, the statutory form ought to be substantially followed. See § 2370, *supra*.

(n) 22 & 23 Vict., c. 35, § 31.

(o) 24 & 25 Vict., c. 84, § 1.

(p) Lewin on Trusts, 5th ed. p. 225, and cases there cited. The latest case is *Brumbridge v. Brumbridge*, 27 Beav. 5,

where a trustee was held liable for money deposited in bank when no further investment was in view. See the important case of *Wilkins v. Hogg*, 81 L. J. Ch. 41, commented upon *infra*, § 2388.

(q) Duff on Deeds, 172. But see the opinion of Professor Menzies to the contrary (Conv., 8d ed. p. 720), founding on *Traquair’s Trs. and Graham v. Hunter’s Trs.*, cited *infra*; and *Dalrymple v. Murray*, 1784, M. 3534, and 16,210.

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question of responsibility, whether as regards intromissions or the actings of a factor, between trustees without a clause of immunity and those possessing a clause in the terms usually employed ; for it would seem to result from the more recent cases that the words *each for his own actual or personal intromissions only*, hitherto supposed of so much practical importance in protecting trustees, are controlled by the effect of a joint discharge, which has been held to imply individual intromission on the part of all the subscribers." The reader, however, will judge of the value of the usual indemnity clause from the decisions to which we are about to call attention, and in which the terms of the clause proved inadequate to protect the trustees against liability for culpably intrusting the trust-funds to a single trustee.(r)

Examples of the enforcement of joint liability notwithstanding the usual indemnity clause.

2382. In one of the earliest cases,(s) where a sum of £160 was received by one of the trustees as part of the price of the trust-estate, upon the joint receipt and disposition of the whole body, and that trustee became insolvent, a judgment of Lord Fullerton, exonerating the other trustees but finding no expenses due to them, was acquiesced in ; but the trustees having afterwards reclaimed on the point of expenses, an opinion was intimated that the trustees had been let off too easily. It appears from Lord Fullerton's note that the effect due to the usual clause of indemnity did not enter into the grounds of his judgment, but that he had proceeded on the view, afterwards found to be erroneous, that the joining in a receipt was not an actual intromission. In a case which occurred a few years later,(t) trustees who neglected to realise an outstanding personal bond were held jointly liable for the consequences of their negligence, notwithstanding that the settlement contained a clause of indemnity in the usual form, commencing with a declaration that the said trustees " shall be noways liable for neglects or omissions, nor for not doing diligence, nor *in solidum*."(u)

Blain v. Paterson.

2383. The effect due to the usual indemnity clause was carefully considered in the subsequent case of *Blain v. Paterson*.(x) Although the judges did not go the length of asserting in express terms that such clauses add nothing to the force of the common law protection against joint and several liability, the decision was

(r) One point at least is clear—that a clause of indemnity is only efficacious for the protection of persons acting within the trust. A trustee who intromits after his appointment is validly recalled loses the benefit of a conventional provision of indemnity ; *Edmond v. Blaikie*, 29 June 1866, 4 Macph. 1011.

(s) *M'Nair v. Broomfield*, 24 June 1830, 8 Sh. 969. A similar opinion was indicated in *Grieve v. Amos' Exrs.*, 24 June 1835, 13 Sh. 978.

(t) *Moffat v. Robertson*, 31 Jan. 1834, 12 Sh. 369.

(u) 12 Sh. 370.

(x) *Blain v. Paterson*, 28 Jan. 1836, 14 Sh. 361.

virtually an affirmance of that proposition. The opinion of the Court upon the point may be collected from the introductory observations of Lord Balgray, who said: "In the first place, it will be observed that the clause of protection is as ample and complete as any one which I ever saw. . . . And the truster was entitled to confer as extensive powers on his trustees as he chose, and to surround them with as strong protections and immunities as he thought right for encouraging them to undertake the gratuitous office which he imposed on them. Of all this the parties who take up the trust-estate have no right whatever to complain, and of all this the trustees must have the most ample benefit."(*y*) But, with every desire to give effect to the truster's kindly intentions, the judges felt bound to lay down the rule that the subscription of receipts was an act of personal intromission, rendering all the subscribing trustees responsible for the default of the trustee who had actually received the money. On the other hand, a trustee who had accepted, but who had not sanctioned any act of intromission, was held exempt from liability.

2384. In the subsequent case of *Seton v. Dawson*,(*z*) which is now the leading authority on the question of joint liability, the Court appear to have thought the indemnity clause (which in this case was expressed in conformity with the usual style) entitled to very little consideration. In the leading opinion of the consulted judges, in which the Lord Chancellor's judgment in *Home v. Pringle*(*a*) is adopted and applied, the principle was laid down, "that neither the protecting clause which occurs in this particular deed, nor any of the usual clauses framed for the same object, can be held to liberate trustees from the consequences of such gross negligence as amount to *culpa lata*."(*b*)

2385. The question may be considered as concluded by the case of *Home v. Menzies*,(*c*) where, notwithstanding a very anxiously-worded clause of indemnity, an issue was sent to a jury, putting the question whether the defender "*wrongfully, and in contravention of his duty as trustee*, allowed the sum of £4375, or thereby, being part of the trust-estate, to pass into and thereafter remain in the hands of the said Alexander Robertson [a co-trustee and factor to the trust], without taking any security therefor, to the loss, injury, and damage of the trust?" This, as it appears to us, is precisely the issue that must have been taken had there been no

(*y*) 14 Sh. 870.

See this case commented upon in sect. 4,

(*z*) *Seton v. Dawson*, 18 Dec. 1841, 4 D. 310.

(*b*) 4 D. 317.

(*a*) *Home v. Pringle*, 22 June 1841, 2 Rob. 384; Lord Cottenham's opinion, 430.

(*c*) *Home v. Menzies*, 10 July 1845, 7 D. 1010. See § 2395, *infra*.

Seton v. Dawson.

Home v. Menzies.
Form of issue for trying question of personal liability.

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indemnity clause. The decision upon the bill of exceptions, sustaining a direction to the jury that the trustees were only liable if they acted in a grossly negligent and culpable manner, does not affect the point under consideration.

Circumstances in which trustees have been held not responsible for the acts of co-trustees.

2386. It is true that, in various cases which have been noticed in the first division of this section, trustees were found to be exempt from personal liability for the intromissions of their co-trustees, and that in several of those cases the terms of the indemnity clause of the settlement have been judicially commented upon as strengthening the presumption, arising upon the circumstances of the case, that the trustees were not to be held liable as intromitters. But it appears to us that, in the view taken by the Court as to the inference deducible from the facts forming the grounds of action in those cases, the trustees would have been entitled to indemnity independently of the terms of the usual clause of indemnity. (*d*)

Trustees held to be only liable in a joint responsibility as for *culpa lata* or supine negligence.

2387. This will be rendered more apparent by comparing the cases referred to with that of *Thomson v. Campbell*, (*e*) where there was no indemnity clause, and yet the trustees were held exempt from personal responsibility for the defalcations of their factor. There was unquestionably some remissness on the part of the trustees—so much so, that Lord Corehouse thought they had rendered themselves responsible for the factor's intromissions. But the test of liability proposed by Lord President Hope was, whether the omission to examine into the factor's transactions "amounted either to *culpa lata* or to supine negligence;" (*f*) and, applying that test, a majority of the Court were of opinion that responsibility did not attach to the trustees.

How the liability of trustees may be effectually restricted. *Wilkins v. Hogg*.

2388. The case of *Wilkins v. Hogg* (*g*) establishes the principle that a truster may absolve his trustees from liability for the consequences of *their own constructive intromissions* by an indemnity clause expressly designating the particular class of acts or circumstances of culpable negligence from the consequences of which he intends to relieve them. The clause was in these terms:—"And I declare that each trustee shall be answerable only for losses arising from his own defaults, and not for involuntary acts, or for the acts or defaults of his co-trustees or trustee; and particularly,

(*d*) The cases referred to are—*Earl of Traquair's Trs. v. Henderson's Trs.*, 6 Feb. 1835, 18 Sh. 417; *Carruthers v. Hall*, 25 Nov. 1830, 9 Sh. 66; *Graham v. Hunter's Trs.*, 4 March 1831, 9 Sh. 543; *Urquhart v. Brown*, 7 June 1843, 5 D. 1142; *M'Millan v. Armstrong*, 6 Dec. 1848, 11 D. 191. See upon this point the observations of Lord Gillies in *Blain v. Paterson*, 14 Sh. 372,

and the joint opinion of Lords Ivory, Gillies, and Murray, in *Seton v. Dawson*, 4 D. 818.

(*e*) *Thomson v. Campbell*, 16 Feb. 1838, 16 Sh. 560. See § 2396.

(*f*) 16 Sh. 571.

(*g*) *Wilkins v. Hogg*, 31 L. J. Ch. 41, affirming judgment of Stuart, V. C., 30 L. J. Ch. 492.

that any trustee who shall pay over to his co-trustee, or shall do or concur in any act enabling his co-trustee to receive any monies for the general purposes of my will, or for any definite purpose authorised by my will, shall not be obliged to see to the due application thereof, nor shall such trustee be subsequently rendered responsible by any express notice or intimation of the actual misapplication of the same monies; but this clause shall not restrict the power of any trustee to require from his co-trustee an account of the application of monies in his hands, or to insist on his replacing monies misapplied by him." There were three trustees of the will who joined in signing and delivering receipts for money received from two insurance offices. One of the trustees, with the consent of his co-trustees, was allowed to retain the amount, on the representation that he would deposit it in one of the London joint-stock banks, there to remain until an eligible investment could be found. He, however, appropriated the amount. On a bill being filed, seeking to make the co-trustees liable, Lord Westbury, Ch. (affirming the decision of Vice-Chancellor Stuart), held that they were protected by the clause of indemnity.

2389. Adverting to the declaration commencing with the words "and particularly," his Lordship observed, that the person who framed that clause must have been aware that if three trustees received money each would be answerable for it *in solido*; but here the case provided for was that of a trustee, being himself the receiver, and then handing the money to his co-trustee for the purposes of the will; in which case the testator said he should "not be obliged to see to the due application thereof." That excluded a second ordinary rule of the Court; because a trustee, knowing another trustee had received money, was not relieved from the duty of seeing to the application of it. After adverting to the proviso with regard to notice of misapplication, his Lordship concluded,—“The trustee was then exempted from obligation; first, when he received the money, and handed it over to another trustee without further concern; secondly, when he permitted his co-trustee to receive the money, and made no inquiry as to its application; thirdly, when he became aware of a misapplication by his co-trustee, and wilfully abstained from noticing it. These three grounds of liability were well known, and they were met by words forcible enough to prevent their operation. There remained, then, a personal misapplication, for which a trustee would be liable. The bill raised no case of a knowledge on the part of the defendants, that the money was likely to be made away with. The ordinary grounds of liability were carefully provided against by this clause; and the liability upon which

Opinion of Lord
Westbury.

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SECTION IV.

LIABILITY FOR THE ACTS OF FACTORS.

Ground of the trustees' liability in this class of cases.

Responsibility (1) to the beneficiary;

(2) to persons with whom factor contracts.

Responsibility of the trustee as regards the propriety of the appointment.

2390. The grounds of liability are very similar to those which we have had occasion to consider in connection with the subject of liability for co-trustees; the chief difference being, that as a factor is, by the nature of his appointment, invested with a larger measure of responsibility, and with more extensive powers than belong to an individual trustee, the Court will not so readily assume that a trustee is culpably negligent merely because the factor fails with funds in his possession. However, the instances in which trustees have been found personally liable for the defalcations of factors are sufficiently numerous to show the necessity of exercising a watchful supervision over the transactions of persons in that situation. The questions to be considered relate, first, to the degree of responsibility which the trustee incurs to the trust-estate, or, to speak more accurately, to the beneficiary, in consequence of the intromissions or omissions of his factor; and secondly, to the responsibility of the trustee to strangers, in consequence of the power which the factor must possess of binding the trust-estate in transactions within the scope of his powers.

2391. It has been usual, where a power of appointing factors is given *per expressum*, to introduce a conventional limitation of the trustees' responsibility by a clause declaring that they shall not be liable for the intromissions or solvency of the factors whom they employ, accompanied sometimes with the proviso that such factors are habit and repute responsible at the time of their employment. As to the latter proviso, we have already had occasion to remark that trustees, if they discharge the duties of their office with honesty and reasonable attention, are not liable for loss accruing to the trust-estate through the fault of others; and therefore, if the appointment of a factor with the usual powers is, in the circumstances of the trust, a beneficial act of administration, we do not know that any higher degree of diligence can be exacted from the trustee, in the matter of *appointment*, than that he should appoint a qualified person, habit and repute responsible at the time.(i) This simple consideration leads to the conclusion, supported, as it will be seen, by decisions of the Court of Session and the House of Lords, that

(h) 31 L. J. Ch. 48, 44.

(i) The Trustee Act is silent on the subject of liability for factors.

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Trustees bound to superintend the factor's transactions.

**Home v.
Pringle.**

(m) *Home v. Pringle*, 22 June 1841, 2 Rob. 884, affirming 16 Sh. 142.

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Mere delay in settling is not to be visited with the penalty of personal liability.

ment of his accounts, and that, in the periodical balances the transactions were not brought down to the period of settlement; and, on the whole, their Lordships were of opinion, that although the factor might have been more strictly looked after, there was no culpable failure of duty, either on the part of the trustees generally, or of one of their number who had been appointed cashier, and had taken the principal share in the management. Such being the judgment of the Court of Appeal on the matter of fact, it was unequivocally laid down by Lord Cottenham, Ch., that no clause of indemnity could shelter the trustees from the consequences of gross negligence, and that the supervision of their factor's transactions was an imperative duty, the neglect of which must entail pecuniary liability.(n)

Liability for neglecting to see that factor has performed the business deputed to him. *Sym v. Charles.*

2394. The case of *Sym v. Charles*(o) illustrates the principle, that where trustees delegate a duty to the factor they must see that he performs it. The trustees, although not specially authorised to do so, had granted a factory to one of their number, who proceeded to realise the funds, and paid off all the legacies excepting one of £500 sterling, left to a lady in America, and which was directed to be invested by the trustees in American stock. In the accounts rendered to the trustees credit was taken for this legacy as paid, although in point of fact the factor had appropriated the sum, and afterwards died insolvent. An action having been brought for payment of the legacy, the Court decreed against the trustees personally for the amount, with interest; being of opinion that the neglect to satisfy themselves by evidence that the legacy had been actually paid was not a mere omission on the part of the trustees, but a virtual consent that the money should remain with the factor.(p)

Home v. Menzies.

2395. In *Home v. Menzies* an issue was sent to a jury to try the question, whether a sum, which was lost in consequence of the bankruptcy of a factor, had been allowed by the trustee to remain in his hands wrongfully, and in contravention of his duty as trustee. Lord President Boyle directed the jury in point of law, "that the defender and his co-trustee were liable if they acted in a grossly negligent and culpable manner; but that, in order to subject them, it was incumbent on the pursuer to prove that they were guilty of gross and culpable negligence." This statement of the law was affirmed by the Court on a bill of exceptions, and the defender was accordingly assoilzied.(q)

(n) 2 Rob., p. 480.

(p) 8 Sh. 745, per Lord Glenlee.

(o) 18 May 1830, 8 Sh. 741; see also *Stewart v Mackenzie*, 27 May 1834, 12 Sh. 686.

(q) *Home v. Menzies*, 10 July 1845, 7 D. 1010.

2396. On the other hand, it was determined, by the judgment of the Court in the case of *Thomson v. Campbell*, that trustees are exempt from liability for the insolvency of a factor, where the trust is such as to require the appointment of a manager, although the deed contains no power of appointment and no clause of immunity, unless they are guilty of "*culpa lata* or supine negligence."^(r) It may be inferred, then, that the rule of liability is the same, whether the deed contains an indemnity clause or not. Lord Corehouse, it may be observed, dissented from the judgment in the latter case, but only because he was of opinion that the actings of the trustees were tainted with *culpa lata*.^(s) The reports of subsequent cases may be consulted with reference to the circumstances from which culpability is to be inferred; but it is unnecessary to seek for further illustrations of the doctrine of liability.^(t)

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Thomson v. Campbell.

2397. Any unreasonable delay in the institution of proceedings against trustees for money lost through the maladministration of a factor or agent, will in general be fatal to the claim; for the trustee may thereby lose recourse against the factor; and it would be unfair that this, his only security against personal loss, should be put in jeopardy through the laches of the beneficiary.^(u)

Liability discharged by delay in the institution of proceedings.

2398. The subject of the liabilities of trustees to creditors of the estate having been considered in detail in the preceding chapter, it would be superfluous to enter minutely into the special case of their liability for the obligations undertaken by their factors. The rule of law is, that the estate is bound by the engagements of the factor, acting within his powers; but not for acts in excess of his authority. The trustee can only be made personally responsible for acts which he expressly authorised the factor to perform; for, as it is no part of the duty of a trustee to pledge his personal credit on behalf of the trust-estate, it is still less to be presumed that a factor's authority extends to the execution of contracts or engagements tending to involve his constituent in personal liability.

The factor's engagements bind the trust-estate, if within his powers;

but not the trustee, unless he gave express authority.

2399. It must be observed, however, that a trustee is liable *ad factum præstandum* where performance is within his power; and therefore, if a factor, duly authorised, has carried through a sale of trust property, the trustee may be compelled by personal diligence to grant a conveyance.^(x) If specific implement has become im-

Trustee must fulfil factor's obligations *ad factum præstandum*;

^(r) *Thomson v. Campbell*, 16 Feb. 1838, 16 Sh. 560, *per* Lord President Hope; see *Dalrymple v. Murray*, 1784, M. 8534.

14 D. 181; *Mabon v. Christie*, 8 Feb. 1844, 6 D. 619.

^(s) 16 Sh. 570.

^(u) *Dalrymple v. Murray*, 1784, M. 16,210, 8534; *Cowan v. Crawford*, 13 May 1836, 14 Sh. 744.

^(t) See *Cowan v. Crawford*, 13 May 1836, 14 Sh. 744; *Ainslie v. Cheape*, 6 Feb. 1835, 13 Sh. 416; *Sloan v. Auld*, 13 Dec. 1851,

^(x) *Thomas v. Walker's Trs.*, 4 July 1829, 7 Sh. 828.

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unless beyond
the scope of the
factor's duties.

Obligations in
excess of the
factor's powers
bind neither the
estate nor the
trustees.

possible—as, for example, in consequence of the property having been carried off by an adjudging creditor—the trustee may be compelled to refund the price of the transaction out of his own pocket.(y) There is, of course, a correlative obligation on the purchaser not to repudiate his transaction with the factor on the ground that express authority from his constituent was wanting.(z) If a factor or law agent to the trust were to enter into speculative transactions out of the ordinary course of trust-management, it is clear that his obligations would not be enforceable against the trustee, although they might be a ground for personal diligence against the factor himself. Therefore trustees will not necessarily be liable for feu-duties in consequence of the purchase of lands for building purposes by the factor without authority;(a) but the seller will, of course, be entitled to try the question whether authority was actually given.(b)

2400. Acts of the factor or agent to a trust in excess of their powers, or in fraud of the trust, will no more be binding on the estate than would the acts of a trustee in similar circumstances. Thus, where an agent to a body of trustees conspired with one of their number, who was heir-at-law, to make up a title in that character, passing over the trust-disposition, and afterwards accepted a disposition in security from the heir in security of advances, the Court, in a count and reckoning, found that the agent, being in the full knowledge of the trust-deed, and of the acceptance and actual operation of the trust under which he admitted himself to be the acting agent, was in *mala fide* to create or to accept of the bond and disposition in security libelled on; that he had acted in *mala fide* in taking infestment on the disposition, and thereafter assigning the same to third parties for a valuable consideration; that, whether the debt acknowledged by the bond was a just debt or not, the defender was bound, in the first instance, and without waiting the adjustment of the trust-accounts, to restore the estate *in integrum* against the real security created by the said disposition and infestment as now standing vested in his assignees. This judgment was affirmed on appeal.(c)

(y) *Thomas v. Walker's Trs.*, 4 Dec. 1832, 11 Sh. 162—sequel of the above case.

(z) See *Innes v. Reid's Trs.*, 22 June 1822, 1 Sh. 518, N. E. 479.

(a) *Gordon v. Cameron's Trs.*, 26 Feb. 1889, 1 D. 577; *Manners' Tr. v. Willison*,

22 Nov. 1831, 10 Sh. 43; see *Lyon v. Sibbald*, 16 Dec. 1823, 2 Sh. 591.

(b) *Manners' Tr. v. Willison*, *supra*.

(c) *Fraser v. Steven's Trs.*, 25 April 1839, M'L. & Rob. 171, affirming 14 Sh. 676; *Drummond v. Lindsay*, 13 June 1857, 19 D. 859.

CHAPTER LXXV.

EXPENSES OF ADMINISTRATION, AND INDEMNIFICATION OF TRUSTEES AND EXECUTORS.

I. *Liability for Expenses of Administration.*II. *Liability for Expenses of Litigation.*

2401. The subjects which are grouped together in this chapter, although logically disunited, are in practice very closely identified, from the circumstance that questions relating to the liability of trustees for expenses of administration or of litigation very frequently involve the consideration of the correlative right of the trustee to be indemnified by the beneficiary. The principle, that the trustee is entitled to be relieved of his obligations and disbursements on behalf of the estate, is implied in the fundamental idea of a trust; as no one can be supposed to charge another with the performance of a gratuitous service on his behalf, without undertaking to indemnify him against risks incident to the duty, and to defray the expense which it necessarily occasions.

SECTION I.

LIABILITY OF TRUSTEES AND BENEFICIARIES FOR EXPENSES OF ADMINISTRATION.

2402. As the trustee's office is gratuitous, it is not to be supposed that by accepting the trust he is bound to perform personally such duties as are capable of being executed by professional persons. Accordingly it has been decided that trustees are entitled to employ an agent for the transaction of the ordinary duties of trust management, and to take credit for his charges in accounting with the beneficiaries. (a) If the business of the trust is such as to re-

Trustee not bound to perform routine duties in person.

(a) *Hay v. Binny*, 19 Feb. 1861, 23 D. 594; *Stewart v. Wilson*, 20 May 1828, 2 Sh. 320, N.E. 282; 2 Wh. & T. L. Ca. 3d ed. p. 280. On the other hand, expenses occasioned by

the trustee's own negligence will be chargeable against himself. See *A. B.*, Petr., 21 Dec. 1855, 18 D. 286, and cases cited *infra*, § 2420; *Malcolm v. O'Callaghan*, 8

CHAPTER LXXV. require continuous management and supervision, it may be performed through the instrumentality of a paid factor. (b) By the usual style of trust-conveyances, trustees are authorised to appoint factors on the footing of professional employment; and, even where no express power is given, their right to make such appointments has been recognised in numerous instances. (c) The questions which claim our consideration include, *first*, the liability of trustees for the accounts of agents, factors, and other persons claiming under a confidential employment; *secondly*, the trustee's right of retention; *thirdly*, his disqualification to accept remunerative employment under the trust.

Whether trustee personally liable to agents, etc.

Agents are presumed to rely on the security of the trust-estate.

2403. (1) We have seen, in treating of the liability of trustees to creditors of the trust, that in all transactions with creditors on the ordinary footing of contract, the presumption, in the absence of direct stipulation to the contrary, is, that the trustee is personally bound to the fulfilment of his engagements, on the principle that parties who are strangers to the trust, and have no means of informing themselves as to the extent of the security which the estate affords, are entitled to rely upon the credit of the person with whom they contract. But it is obvious that this principle fails when applied to transactions between the trustee and persons employed as agents or factors, and standing in a confidential relation towards the trust. The position of an agent or factor gives him, in most cases, at least as ample, often a better, opportunity of informing himself as to the situation of the trust-estate and the security which it affords, than the trustee himself; and it is the duty of a paid agent to take care that those who are interested in the estate are not involved in liability for expenses to an extent exceeding the value of their interest. An agent is of course not bound to carry on a litigation, or an expensive course of management, at his own risk; but neither is he entitled to involve his constituent in indefinite liability for unprofitable expenditure. His duty,

My. & Cr. 52; *Caffrey v. Darby*, 6 Ves. 488, 497. The rule stated in the text does not apply to the case of trustees in bankruptcy, who are remunerated by a commission on their transactions, and who are therefore bound, as far as possible, to perform the duties of the office in person; *Wilson's Trs. v. Wilson's Crs.*, 4 Nov. 1868, 2 Macph. 9.

(b) As to the employment of accountants, see *Peddie v. Beveridge*, 7 Feb. 1860, 22 D. 707.

(c) See Bell's Pr. § 1998; *Sym v. Charles*,

18 May 1830, 8 Sh. 741. If the testator has nominated a factor, it has been considered that the trustees have not the power of removing him except on reasonable grounds. See *Fulton v. M'Alister*, 15 Feb. 1881, 9 Sh. 442; *M'Craig v. M'Auley*, 22 Jan. 1886, 14 Sh. 318. A trustee is not entitled to charge against the estate expenses incurred to a private agent, whom he consults for his own protection; and in general, all charges for double agency will be disallowed; *Ramsay v. Souter*, 18 Dec. 1863, 2 Macph. 343.

therefore, in the prospect of the estate being exhausted in expenses, is to require a personal guarantee for his expenses, either from the trustee or from the parties who have the beneficial interest; and if he does not take this precaution, the loss will fall upon himself; the presumption being that he is employed as agent for the estate, and not upon the personal responsibility of the trustee.

2404. In the cases that have hitherto occurred involving the element of the personal responsibility of trustees for the employment of agents, the question of liability has been treated rather as a question of fact than of law; but the opinions expressed support the view which we have stated. In the two cases of *Cullen v. Baillie*(d) and *Manson v. Baillie*,(e) which arose out of the same trust, the question was complicated by the consideration that the agent who made the claim against the trustees was himself both a trustee and a beneficiary; but the doctrine of non-liability in the general case was plainly asserted by the judges. For example, in the first action, Lord President Boyle said: "The relation in which the pursuer Manson(f) stood in regard to all the defenders—the sacred obligation that lay on him, instead of taking such a commission, and acting on it as he did, *to make them fully aware of the whole business of the trust, and how he was conducting it*,—together with what I hold to be the sound exposition of the law as given in the case of *Home v. Pringle*,(g) . . . lead me to the conclusion that the action should receive no countenance whatever, but that the defenders should be assoilzied from its whole conclusions."(h) Lord Mackenzie observed, on the assumption that Manson was legally appointed factor and agent, and that as there was no *pactum illicitum*, the question was, whether Manson had any claim on the trustees beyond the trust-funds. Considering that the trustees contracted as trustees—it being expressly stated that they did so contract—he thought they were not liable personally, unless there was *mala fides* or *culpa lata* on their part in inducing the other party to believe that the trust-funds were sufficient; and that, as factor, Manson was strongly called on, if he had the least contemplation of coming on the trustees personally, to give them notice of his proceedings. If he did not, he did not act fairly towards the trustees.(i) Lord Jeffrey said that, looking to the circumstances from which employment was implied, the question which the Court

Liability to agents is partly a question of fact.

Cullen v. Baillie.

(d) *Cullen v. Baillie*, 20 Feb. 1846, 8 D. 511.

(e) *Manson v. Baillie*, 19 June 1855, 2 Macq. 80. See also *Paterson v. M'Lelland*, 4 June 1824, 3 Sh. 108, N. E. 68.

(f) The real pursuer was an assignee of Manson, the agent in the trust.

(g) *Home v. Pringle*, 22 June 1841, 2 Rob. 432.

(h) 8 D. 519.

(i) 8 D. 520.

CHAPTER LXXV. had to consider was, what stipulation the parties would have expressed if they had been called on to do so, and whether it was to be conceived that the trustees really intended to pledge their personal credit.^(k)

Lord Fullerton's
opinion.

2405. But the most distinct enunciation of the principle of non-liability is contained in Lord Fullerton's opinion, from which we extract the following passage:—"In regard to debts originating with the truster, and devolving on the trustees only by the force of the trust, there can be no doubt that trustees are bound only in their fiduciary character, consequently not *ultra valorem* of the trust-estate. But in regard to debts contracted by the trustees themselves, although it may be *bona fide* for the trust-purposes, they will be personally bound to third parties unless it appear clearly from the terms of the transaction that the creditor expressly took the trust-estate, as distinct from the individual trustees, as his debtor. In such cases it is held, and justly held, that the trustees, who are supposed to know their own trust affairs, are bound to warrant the sufficiency of the trust-funds to the persons with whom they deal, and who have no such means of information. If the present claim, then, had been one brought by a person unconnected with the trust, for furnishings made or services performed on the employment of the trustees, it might have been sustained on the principle last alluded to. But the circumstances here are different, and very peculiar; and it is by the principles applicable to these peculiarities that the claim must be tested and determined." His Lordship then, after stating the circumstances, proceeded to observe that Mr Manson, by acceptance of the factory, undertook to make himself master of the whole details of the trust; an undertaking which, in a question between him and his co-trustees, was rather a warranty of the trust-funds to them than from them to him, since it was Mr Manson's business to satisfy himself of the sufficiency of the funds before he incurred expenses which were rendered necessary by his own exclusive management. The conclusion at which his Lordship arrived was, that to support the action, "it would be necessary for Mr Manson not only to show that the expenses were incurred under the factory, but that they were specially authorised and directed by the co-trustees, after being made distinctly aware that the trust-funds were deficient; and that, in the event of the deficiency being permanent, the expense was to be made good by them."^(l) The reasoning of the Lord Chancellor^(m) in the appeal case, while substantially in accordance with the opinions of the

Judgment of the
House of Lords.

^(k) 8 D. 524.

^(l) 8 D. 521-3.

^(m) Lord Cranworth, 2 Macq. 82.

judges of the Court of Session, is so much interspersed with comments on the circumstances of the case, that it does not admit of being exhibited by quotations. The report, however, is deserving of careful study.

2406. It is scarcely necessary to add, that if a trustee deprives the agent of the security of the trust-estate, as by denuding before the trust-accounts are settled, the agent will have recourse by a direct action against the trustee. This principle was given effect to in a case where a trustee, after granting a bill to the agent in a sequestration, acceded to a composition arrangement, and paid over the balance of the funds in his hands to the bankrupt, without providing for the payment of the bill.⁽ⁿ⁾

Trustee denuding while agent's claim is unsettled incurs a personal responsibility.

2407. It is a question not free from difficulty, whether the expenses of agents and factors form a charge against the parties beneficially interested in the administration, in the event of the free estate having been exhausted by the costs of litigation or management. On this point the cases of *Cullen* and *Manson v. Baillie*, already referred to, are of some authority; because Sir William Baillie, one of the defenders in those actions, was not only a trustee, but one of the parties most largely interested in the estate, having been left a legacy of £3000, with a share in the residue proportionate to his legacy. The decision of the House of Lords, absolving him from liability, is therefore a direct precedent, adverse to the supposition of such a claim. Although the principle of *Home v. Pringle*—viz., that the pursuer, being himself a trustee, was not entitled to sue for professional remuneration—was referred to, both in argument and in the opinions of Lord Cranworth and Brougham, the judgment was certainly not rested upon that principle. If it had been, the pursuer would have been entitled, at all events, to costs out of pocket; whereas in the actual decision his claim was wholly rejected, on the ground that the contract was not with the trustees or with the beneficiary, but with the trust-estate.

Whether agent has a claim against the beneficiary in the event of the exhaustion of the trust-estate.

2408. In the case of *Brodie v. Macfarlane's Creditors*, where a petition by an agent in a sequestration against the creditors, for payment of his account, was sustained, it appeared that a considerable sum had been actually recovered in the proceedings for which the account had been incurred, and that this sum had been divided amongst the creditors. They were therefore clearly liable in payment of the account to the extent of the benefits which they had received.^(o) The case may also be supported on a different prin-

Agent employed on a special contract, and not confidentially, has a claim against the constituent.

⁽ⁿ⁾ *Swan v. Wright*, 15 Jan. 1829, 7 Sh. 268. 1846, 8 D. 537. But see *infra*, § 2413, as to the exemption from liability of creditors claiming in a sequestration.

^(o) *Brodie v. Macfarlane's Crs.*, 20 Feb.

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ciple, namely, that where an agent is not appointed directly by the trustees as their confidential adviser, but is employed by another agent to perform a specific piece of business, he is in the same situation as a tradesman employed under the trust, and is entitled, on the principle explained by Lord Fullerton in the passage already quoted, to recover from those by whom he was employed. (p)

Members of committees, public trusts, etc., liable for expenses which they have authorised.

2409. Members of a provisional committee for promoting a railway or other public undertaking are not liable in payment of the accounts of agents or employees of the committee, unless they have expressly and individually sanctioned the employment, or undertaken to guarantee remuneration. (q) Mere attendance at meetings of a committee does not infer liability for its engagements, unless the contracts in question were sanctioned at meetings at which the defender was present as a concurring party. (r) The same principle is applicable to the liability of members of public trusts. (s)

Trustee has a claim against the beneficiary for the expenses after the exhaustion of the estate,—

2410. (2) If a trustee has paid expenses incurred on behalf of the trust out of his own pocket, and the funds ultimately prove insufficient to meet his claim upon the estate, the question, whether he is entitled to relief by a personal action against the beneficiaries, seems to depend on the circumstances of the transaction. Trustees, as a general rule, are only entitled to debit the beneficiaries with expenses profitably or legitimately incurred in promoting their interests; and it is difficult to see how the expenses of legitimate management could, in any ordinary case, exceed the value of the estate which was the subject of management. But let us suppose a case where trust-funds have been lost through innocent misfortune; as, for example, where a settlor expressly directs his trustees to invest funds in shares, or other securities not authorised by the Court, and the security fails. In such a case there could be no doubt that, if the beneficiaries had recognised the trust, they would be bound to relieve the trustees from the contingent liabilities arising out of the investment; (t) and, on the same principle, we think they would be under an obligation to reimburse the trustees for the outstanding expenses of management. If beneficiaries expressly authorise a trustee to carry on litigation in their names,

where trust-funds lost without fault on part of the trustee,—

where the expense was authorised by the beneficiary.

(p) *Brodie v. Macfarlane's Crs.*, *supra*; *Bell v. Izett's Trs.*, 9 June 1854, 16 D. 915; see Lord Fullerton's opinion, *supra*, § 2405.

(q) *M'Ewen v. Campbell*, 19 Feb. 1857, 2 Macq. 499; *Campbell v. Lauder*, 27 Nov. 1852, 15 D. 117; *Johnston v. Scott*, 18 Jan. 1860, 22 D. 398; and see *Bright v. Hutton*, 8 H. of L. Ca. 341, where the doctrine of non-liability was laid down by the House

of Lords on principles applicable to the jurisprudence of the whole United Kingdom.

(r) *Campbell v. Lauder, Johnston v. Scott*, *supra*.

(s) *Higgins v. Livingstone*, cited *supra*, § 2319.

(t) See this point discussed in the previous chapter.

they must of course be liable to relieve him of his expenses, whether funds be recovered or not.(u) CHAPTER LXXV.

2411. It is clear, in any case, that while the funds of the estate are liable, in the first instance, in security of the onerous obligations incurred by the trustee to third parties on behalf of his constituents, the trustee himself has a claim upon the surplus funds preferable to that of his constituents.(x) In virtue of this equitable claim, the trustee may insist on his right of retention, in answer to a demand at the instance of the beneficiary for an unconditional surrender of the estate.(y) The trustee would seem, also, to be entitled to obtain from the beneficiary an indemnity for current obligations which he may have undertaken on behalf of the trust as a condition of denuding.(z)

Trustee is entitled to be indemnified out of the trust-estate.

2412. The preceding observations have reference to the case of trusts for the benefit of third parties. Where the object of the transaction is to create a security in favour of the trustee himself, the extent of his right depends upon the form of the conveyance. The different conditions were distinguished with great precision by Lord Fullerton in the leading case of *Robertson v. Duff*,(a) and subsequent cases have added little to his conception of the rights

Right of retention in security transactions.

(u) *Jeffrey v. Bathgate's Trs.*, 16 Dec. 1823, 2 Sh. 584, N.E. 502; *Mercer v. Orr*, 11 Dec. 1823, 2 Sh. 574, N.E. 494; and see *Graham v. Marshall*, 22 Nov. 1860, 28 D. 41. Mr Lewin is of opinion that, notwithstanding the exhaustion of the estate, the trustees have a claim upon the beneficiary, which may be enforced by action, for money expended in the prosecution of the trust purposes, and within the scope of their powers; Lewin on Trusts, 5th ed., p. 456, citing *Balsh v. Higham*, 2 P. Wms. 458; *ex parte Chippendale*, 4 DeG. M'N. & G. 19, 54. On the general rule, that trustees are entitled to be reimbursed for their expenses, it is unnecessary to cite English authority; but the following exceptions may be noted. Expenses of improper litigation, or litigation occasioned by the trustee's fault or negligence, will be disallowed; *Malcolm v. O'Callaghan*, 3 M. & C. 52; *Caffrey v. Darby*, 6 Ves. 488, 497. If a trustee has neglected to keep an account of his expenses, the Court will make an estimate, on the principle of allowing a sum that may be less than, but cannot exceed, what he is entitled to claim; *Hethersell v. Hales*, 2 Ch. Rep. 158. A trustee who has incurred liabilities on behalf of his constituent may call upon the latter to indemnify him against the lia-

bility, before actual loss has accrued; *Phené v. Gillan*, 5 Hare 1, 9-13, and he may retain the trust-estate until relieved of obligations undertaken on account of it; *ex parte James*, 1 Deac. & C. 272; but see *Worrall v. Harford*, 8 Ves. 8; *Shaw v. Lawless*, 5 Cl. & Fin. 129. If a trustee agree to pay an accountant or manager at an extravagant rate, the Court will reduce the charge against the estate to a reasonable amount; *Weiss v. Dill*, 3 My. & K. 26.

(x) Bell's Com. 851-2; *Cook and Paul v. Jeffrey*, 10 Sh. 75; 15 May 1835, 1 S. & M'L. 707; and see *Aikman v. Aikman*, 17 March 1863, 1 Macph. 639; *Baxter and Mitchell v. Wood*, 24 March 1864, 2 Macph. 915.

(y) *Wilson v. Mags. of Dunfermline*, 17 May 1822, 1 Sh. 417, N.E. 389; *Fraser v. M'Naughton*, 21 Nov. 1829, 8 Sh. 104; *Barron v. National Bank of Scotland*, 28 Feb. 1852, 14 D. 565. See also *Sturgeon v. M'Lellan*, 20 Jan. 1813, F.C.; *Murray's Creditor v. Chalmer*, 1744, M. 2626; *E. of Bedford v. L. Balmerino*, 1662, M. 9185.

(z) *M'Growther v. Hill*, 2 March 1822, 1 Sh. 371; anonymous case, 21 Nov. 1829, 8 Sh. 103; *Innes v. Innes*, 18 Dec. 1728, 7 Sh. 206; *Carse v. Carse*, 1666, M. 16,165.

(a) *Robertson v. Duff*, 14 Jan. 1840, 2 D. 279; see pp. 291-2.

CHAPTER LXXV. of the trustee in security transactions. It may be sufficient for our purpose to say, that (1) where the trust is constituted by an unqualified *ex facie* absolute disposition, or by an absolute disposition qualified only by a back-bond which is perfectly general in its tenor, the trustee has an effectual security both for prior and subsequent advances; (b) (2) that where the back-bond specifies particular obligations, but the language is not such as to restrict the security to these, the trustee may retain for subsequent advances; (c) and (3) that if the trust is declared in a back-bond, or *in gremio* of the disposition, to be in security of particular debts, the trustee has no general right of retention either for past or for subsequent advances. (d)

Immunity of
creditors under
Bankruptcy Act.

2413. By the 57th section of the Bankruptcy Act it is enacted that "No person shall, by merely lodging an oath and claim, or being ranked, or receiving payment of a dividend, or appearing or voting at a meeting in a sequestration as a creditor, be liable for any claim by the agent or other person employed by the trustee for money advanced, or expense incurred, or remuneration in relation to the affairs of the estate; reserving to the agent, or other person so employed, right to payment out of the estate, and from the trustee by whom he may have been employed, in so far as the same may be competent to him; and no trustee shall have relief in respect of such payment against such creditor, reserving to such trustee relief against the estate, and against those creditors or others who may on other grounds be liable in relief." (e)

Liability of
creditors under
voluntary trusts.

2414. It was decided in an old case, reported by Elchies, (f) that creditors left out of a scheme of distribution for not acceding, could not be burdened with the expense of diligence for completing the trustee's right, or of ranking the creditors; but that the trustee was entitled to recover from them the common expense laid out for behoof of all the creditors. The right to burden creditors with the expenses of constituting the trustee's right seems to depend on whether they claim under the trust or in competition with it. (g)

Parliamentary
commissioners,
etc., have no
claim against
the fund for
expenses not
authorised by
the Act of In-
corporation.

2415. Parliamentary commissioners and trustees are not entitled to charge against the funds committed to their management the

(b) *Brough v. Jollie*, 1798, M. 2585; *Leckie v. Leckie*, 21 Nov. 1854, 17 D. 81; *Walker v. Buchanan, Kennedy, & Co.*, 11 Dec. 1857, 20 D. 259; *M'Lelland v. Bank of Scotland*, 27 Feb. 1857, 19 D. 574.

(c) *Russell v. E. of Breadalbane*, 4 April 1881, 5 W. & S. 256, affirming 7 Sh. 767; *James v. Downie*, 15 Nov. 1836, 15 Sh. 12;

Maitland v. Cockerell, 23 Nov. 1827, 6 Sh. 109.

(d) *Robertson v. Duff*, *supra*; and see cases on proof of trust, chap. 47, sect. 1.

(e) 19 and 20 Vict., cap. 79, § 57.

(f) *Charteris v. Cred. of Merchiston*, 1784, Elch., "Trust," No. 2.

(g) The principle is illustrated by the cases noted *infra*, section 2.

expense of an application to Parliament for a prolongation or extension of their powers.^(h) On this principle, also, interdict has been granted against railway directors applying funds of the shareholders towards the expense of an application to Parliament for additional powers.⁽ⁱ⁾ And where the magistrates of a burgh, who were trustees of a charitable foundation, had incurred expense in unsuccessfully promoting a bill to extend the operation of the charity, the Court granted interdict, at the instance of the truster's representatives, against the application of the funds for that purpose, although the minority, who disapproved of the bill, were willing that the account should be paid.^(k) However, trustees are entitled to the expense of *opposing* a bill before parliament which is calculated to injure the estate, as this is a necessary part of the expense of administration.^(l)

2416. (3) The doctrine is now firmly established, that trustees and judicial managers are not entitled to charge for professional services rendered to the trust, whether directly, or indirectly through their partners in business, whether in the capacity of law-agent,^(m) or in that of factor or cashier;⁽ⁿ⁾ unless the employment in the character of professional agent is sanctioned by the beneficiaries,^(o) or by the terms of the settlement under which the trustees act.^(p) The disqualification is not applicable to tutors and curators *ad litem*,^(q) but this is the only exception. Accordingly, the offices of Parliamentary trustee,^(r) trustee for creditors,^(s) and judicial manager (including both factors and curators),^(t) have been found by

Trustee not entitled to charge for professional services rendered by himself to the trust; unless such employment is expressly authorised.

(h) *Pet. Myles*, 18 Dec. 1855, 18 D. 205. And see chapter 58 (Powers of Trustees), where the English authorities are stated.

(i) *Brown v. Adam*, 19 Feb. 1848, 10 D. 744.

(k) *Mackintosh Trs. v. Mackintosh*, 30 June 1852, 14 D. 928.

(l) *Pet. Campbell*, 12 Jan. 1847, 9 D. 397.

(m) *Lord Gray v. Dundas*, 21 June 1856, 19 D. 1; *Seton v. Dawson*, 18 Dec. 1841, 4 D. 319; *Broughton v. Broughton*, 5 De Gex, Mac. & G. 160; and see *Manson v. Baillie*, 19 June 1855, 2 Macq. 82, 91, overruling *Craddock v. Pyper*, 1 Mac. & G. 664; *Flowerdew's Trs.*, 22 Dec. 1854, 17 D. 268; *Morrison v. Rennie*, 26 April 1849, 6 Bell, 422, reversing 9 D. 1483; and cases cited below.

(n) *Home v. Pringle*, 22 June 1841, 2 Rob. 384; *Wellwood's Trs. v. Hill*, 17 Dec. 1856, 19 D. 187; *Fegan v. Thomson*, 20 July 1855, 17 D. 1146; *Bon Accord Marine*

Ins. Co. v. Souter's Trs., 13 June 1850, 12 D. 1010.

(o) *Miller's Trs. v. Miller*, 23 Feb. 1848, 10 D. 767, last point; *Ommanney v. Smith*, 8 March 1854, 16 D. 721; *Handyside's Trs. v. Scott*, 24 Jan. 1868; and see *Fegan v. Thomson*, 20 July 1855, 17 D. 1146, and *Lauder v. Miller*, *infra*.

(p) *Goodsir v. Carruthers*, 19 June 1858, 20 D. 1141; *Craddock v. Pyper*, *supra*; *Learmonth v. Paterson*, 13 Feb. 1858, 20 D. 564; *Findlay's Trs. v. M'Omie*, 6 March 1852, 14 D. 621.

(q) *Pirrie v. Collie*, 4 March 1851, 18 D. 841; *Pet. Rennie*, 27 June 1849, 11 D. 1201.

(r) *Lord Gray v. Dundas*, *supra*.

(s) *Lauder v. Miller*, 15 July 1859, 21 D. 1353; *Johnston's Cr. v. Johnston's Tr.*, 1788; see 21 D. 1383.

(t) *Kennedy v. Rutherglen*, 25 Jan. 1860, 22 D. 567; *Baillie and Douglas' cases*, 19 D. 1; *Rennie and Flowerdew*, *supra*.

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express decisions to be offices of trust in the sense of the rule ; so that persons holding these offices cannot accept remunerative employment under the trust.

"Reasonable gratification."

2417. In a case where trustees were empowered to appoint factors and agents of their own number, and to allow the factor "a reasonable gratification for his trouble," and the trustees had appointed one of their number factor, with a commission of 5 per cent., the Court, on an objection being taken by the beneficiaries to the amount of the commission, restricted it to $2\frac{1}{2}$ per cent. (u)

Whether a trustee can claim remuneration for his services in carrying on the truster's business.

2418. The case of *Hay v. Hay's Trustees*, in the Second Division, (v) raises the question, whether trustees empowered to carry on the truster's business are entitled to make profit out of the business. In this case one of the trustees was assumed as a partner in his individual capacity, on the footing that a certain amount of capital was to be advanced to him, which was to be repaid out of the share of profits falling to him as partner. Although the point is not decided, we may observe, that unless partnership contracts are to be made an exception from the general rule which prohibits trustees from entering into any remunerative contract with the trust-estate, the assumption of a trustee as a partner cannot be supported. It is another question whether the partner might not be allowed some compensation for his trouble, on the ground that his *whole* time had been given to the service of the trust. The argument *ad misericordiam* in a such a case is very strong. (x)

(u) *Thomson's Trs. v. Robb*, 9 July 1851, 13 D. 1826. The principle is more fully explained in chapter 54, sect. 1.

(v) June 1862. The case does not appear in the reports ; it was, therefore, most probably withdrawn by arrangement before judgment was pronounced.

(x) In *Brocksopp v. Barnes*, 5 Madd. 90, where a testator had directed certain business to be carried on by his trustees and executors, a petition was presented to the Court of Chancery by one of the executors, to ascertain what ought to be allowed him as compensation for his trouble. Sir John Leach, V.-C., held, that while the trustee was entitled to all reasonable expenses incurred in the conduct of the trust, there was nothing in the circumstances to take the case out of the general rule, that a trustee is not entitled to compensation for personal trouble and loss of time. The leading English case on this point is *Robinson v. Pett*, 3 P. Wms. 249 ; 2 Wh. & T. L. Ca. 3d ed. p. 219 *et seq.* See also

Burden v. Burden, 1 V. & B. 170 ; *Stocken v. Dawson*, 6 Beav. 871.

It is impossible, within the limits of a note, to attempt even an abstract of the English decisions on the subject of allowances to trustees. We shall, therefore, notice only such of the decisions as bear upon the less known or settled points in our law. The general rule is, that remuneration cannot be claimed by a trustee who acts as solicitor to the trust, *New v. Jones*, 1 Hall & T. 682, *Christopher v. White*, 10 Beav. 528 ; solicitor in bankruptcy, *ex parte Newton*, 3 De G. & Sm. 584 ; factor, *Scattergood v. Harrison*, Mos. 128 ; or auctioneer, *Kirkman v. Booth*, 11 Beav. 278 ; *Mathieson v. Clarke*, 3 Drew. 3. Under the general expression *trustee* are included mortgagees ; *Mathieson's case*, *supra*, and *Sclater v. Cottam*, 3 Jur. 680 (where a mortgagee, who acted as his own solicitor, was only allowed costs out of pocket as against a second mortgagee) ; also directors, *York and N. Midland Ry. Co. v. Hud-*

2419. If a legacy is given to trustees expressly as a recompense for their trouble, they cannot claim it unless they accept. But if the legacy is not expressed to be in consideration of their services, the presumption is that it is a gift, and not conditional upon acceptance. (y)

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Legacy to trustees, whether conditional on their acceptance of office.

SECTION II.

LIABILITY FOR EXPENSES OF LITIGATION.

2420. Subject to certain exceptions, which we shall afterwards notice, a trustee is generally liable to creditors for any expense which may be occasioned by opposition on his part to their just demands. (z) That the enforcement of this principle entails no hard-

Trustees, as a rule, are liable for the expenses of litigation.

son, 16 Beav. 485, 500; and joint-owners, *Smith v. Lay*, 8 K. & J. 105, *sed quære*. But a person who is merely a constructive trustee, *e.g.*, a surviving partner, who continues to manage a business for the family without having been authorised to act as trustee,—although he must account for the profits earned with his constituents' money,—is entitled, in addition to his share of profits on his own capital, to an allowance for his management of the business; *Brown v. De Tastet*, Jac. 284, decided by Lord Eldon; and cases in 2 Wh. & T. L. Ca. 8d ed. p. 287.

Even in the case of express trusts, it has been held that where work is done by a trustee which could not have been so well done by any other person, he may have a claim to recompense. For example, in *Bainbridge v. Blair*, 8 Beav. 595, 14 L. J. 405, where a solicitor and trustee had acted as agent to the trust, and devoted a large share of his time to the arrangement of certain lawsuits and other family matters with which he was peculiarly conversant, it was observed by Lord Langdale, M.-R., founding on the case of *Marshall v. Holloway*, 2 Sw. 458, that though he could not give compensation under a summary application, yet, if the application had been timeously and competently made, the trustee might have had an allowance, not in the shape of professional remuneration, but as a recompense for trouble in addition to his outlay. The judgment in *Cradock v. Pyper*, 1 Mac. & G. 664, if it is to be regarded as of any authority, must be referred to the same principle.

The rule may be excluded by an express contract for remuneration with the *cestui que trust*; but the decisions show that the Court will construe such agreements very strictly, and will, if possible, assume that the parties contemplated payment for outlay, and not for trouble or professional services. Such, accordingly, was the construction put in *Moore v. Frowde*, 8 My. & Cr. 45, 6 L. J. Ch. 372, on a clause in a trust-deed which provided, (1) that all the expenses, disbursements, and charges, already or thereafter to be *incurred, sustained, or borne* by the trustees, etc., should be paid, in the first place, out of the produce of sales of the estate; and (2) that the trustees should, out of the trust-mones, reimburse themselves for all such reasonable costs, charges, and expenses as they should or might *sustain, expend, or be put unto*, in or about the execution of all or any of the trusts thereby in them reposed, such costs, charges, and expenses, to be reckoned, paid and stated *as between attorney and client*. "This last provision," said Lord Cottenham, "does no more than the rule of law would have done—a trustee's costs being taxed as between attorney and client. And what are the costs so to be taxed? Costs which the trustee may sustain or be put to—terms wholly inapplicable to sums claimed as remuneration;" 6 L. J. Ch. 374.

(y) See the cases commented on, chapter 55, sect. 2, *in fin*.

(z) *Raeburn v. Dawson*, 14 June 1831, 9 Sh. 728; *Clyne's Trs. v. Alison*, 8 Feb. 1840, 2 D. 554; *Gibson v. Pearson*, 25 May

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Trustee may require a guarantee from constituent.

Not bound to engage as an active litigant.

Trustee may escape from prospective liability by resigning.

Trustee may protect the interests of minors through the intervention of a curator *ad litem*.

ship to the trustee, is apparent from this simple consideration, that the trustee is not bound to go on with the litigation after the funds available for defending the action are exhausted. As a mere question of prudence, a trustee would not be justified in exhausting the estate by litigation without the sanction of the beneficiaries; and, in justice to himself, he may require from them a guarantee in security of his right to indemnity. Besides, it is the fault of the trustee if he ever puts himself in the position of an active litigant. His natural attitude is that of neutrality. In the prospect of serious litigation in regard to claims upon the trust-funds, the resource is always open to him of raising an action of distribution, where he appears simply as a stakeholder, and in which the expenses of his formal appearance form a first preferable charge upon the fund *in medio*.

2421. Prior to the recent changes in the law with respect to the resignation of trusteeship, a trustee might, however, have been placed in a somewhat embarrassing position, in the event of the trust-estate embracing unsettled claims which he might consider himself under an obligation to realise, but which could only be recovered by legal process involving liability for expenses. Even in that case the trustee has still the resource, that he is entitled to demand security from his constituents for the contingent expenses before resorting to legal proceedings. It is clear, at all events, that beneficiaries refusing to indemnify the trustee in such circumstances would be effectually shut out from any ground of complaint against him in consequence of his refusing to carry on the litigation at his own personal risk. Under the provisions of the Trustee Act (a) the trustee has now open to him, as a last resource, the power of resignation, by the exercise of which he is enabled to devolve the administration upon the Court, who will instruct their factor as to the course he ought to pursue with respect to litigation, and shield him from personal liability for obedience to their behests.

2422. It may be asked by what means trustees charged with the protection of the interests of minors may be enabled to protect themselves from liability for the expenses of litigation, observing that a minor has not the capacity to enter into an arrangement for the indemnity of his guardians? The answer is obvious. If the minor is in the position of a claimant, the trustees have only to apply for the appointment of a curator *ad litem* for his interest,

1833, 11 Sh. 656; *Wylie v. Smith*, 15 Nov. 1834, 13 Sh. 40; *Sandeman v. Shepherd*, 4 July 1835, 13 Sh. 1037; *Robertson v. Morrison*, 4 Dec. 1823, 2 Sh. 553, N. E. 479; *Welsh v. M'Arthur*, 15 June 1826, 4 Sh. 710, N. E. 715. (a) 24 & 25 Vict., cap. 84; 26 & 27 Vict., cap. 115.

and, after the appointment is made, to advance such interim payments out of the trust-estate as the Court may think proper to allow for the prosecution of his claim. This was the course recommended by the Court in a case where trustees, under circumstances admittedly of great hardship, were found personally liable for the expenses of a suit in which they appeared as defenders.(b) The trustees were custodiers of an alimentary fund, secured by marriage-contract to the wife for her alimentary liferent, and to the children in fee; and although they were successful in defending the estate against a most vexatious attempt on the part of the husband (a bankrupt), suing with concurrence of his wife, to obtain possession of the fund, they were condemned in the meantime to bear the expenses of their defence, on the ground that these did not form a proper charge against the alimentary interest. It was observed by the Court, that the trustees might have avoided personal liability by making application to the Court for the appointment of a curator *ad litem* to the wife and children, which, when an alimentary fund was at stake, their Lordships would not have hesitated to grant.(c)

2423. In the further elucidation of this subject we shall distinguish between the cases on (1) expenses arising out of litigation with third parties not connected with the trust, and (2) expenses incurred in litigating with parties claiming under the settlement.

2424. I. EXPENSES OF LITIGATION WITH PARTIES NOT INTERESTED IN MAINTAINING THE TRUST.—We are now to notice a few of the cases which, from their importance or their exceptional character, illustrate the general proposition that trustees are personally liable for expenses in questions with creditors of the estate, or parties disputing the validity of the trust. In the comparatively early case of *Raeburn v. Dawson*,(d) trustees under a voluntary trust were, by a unanimous decision of the First Division, held personally liable for the expenses caused by their opposition to an action at the instance of a creditor in a building contract, in which they stated counter claims on the part of their constituent, and also claimed the right to retain the amount of their own outlay for the comple-

Doctrine of liability to creditors for expenses illustrated.

(b) *Robertson v. Morrison*, 27 Jan. 1849, 11 D. 457; *Graham v. Marshall*, 22 Nov. 1860, 23 D. 44.

(c) 11 D. 459. In *Fraser v. Pattie and Tutor ad litem*, it was expressly laid down that the Court could give no decree for expenses against a tutor *ad litem*; Lord Mackenzie observing that they might as well be asked to find the counsel liable; 9

March 1847, 9 D. 908. See also *Johnston v. Beattie*, 29 Jan. 1856, 18 D. 343; and *Forbes v. Morrison*, 8 June 1844, 6 D. 1118, where a charge against a *curator bonis* for the expenses of litigation was suspended without caution.

(d) *Raeburn v. Dawson*, 14 June 1881, 9 Sh. 728. But see *Dickson v. Bonar's Trs.*, 20 Nov. 1829, 8 Sh. 99.

CHAPTER LXXV. tion of the contract. In *Jackson's Trs. v. Black(e)* trustees were held liable to a creditor for the expense occasioned by their opposing decree of constitution in an action at his instance.

Kirkland v. Oighton.

2425. In a more recent case, *(f)* where testamentary trustees raised action against a firm, of which the testator had been a partner, for payment of a bill for £200 granted to the testator, and were met by a counter action of count and reckoning as to the testator's intromissions with the effects of the company, which resulted in decree being pronounced against the trustees, as his representatives, for a sum of upwards of £600, the Second Division recalled an interlocutor which had been pronounced in the Sheriff-court, finding the trustees personally liable for the expenses. It is to be observed, that in this case the position of the truster, as a partner in the litigating company, rendered an accounting necessary, and that the litigation was forced upon the trustees by the course which the pursuers adopted, of raising an action of accounting instead of proposing an extrajudicial settlement. In this view of the case, Lord Moncreiff observed—"Were not the trustees in *bona fide* in believing that no such claim as that in the count and reckoning was to be made? The accounting followed the action for the £200, and the trustees were forced into it. They had no ground for supposing that they would be involved in a count and reckoning. It was their duty to make the claim for the £200 which was met by the count and reckoning; and, in the circumstances, I think it would be extreme severity against the trustees to say that they were to be personally answerable."

Exhaustion of trust-estate not pleadable in answer to creditors.

2426. It has frequently been pleaded on behalf of trustees, in reclaiming against a judgment finding them personally liable for expenses, that they ought not to be subjected in personal liability to the creditor because the trust-estate was exhausted, and that there were no funds out of which they could reimburse themselves. In some of the earlier cases an inquiry was permitted as to the fact of the trustees being in possession of funds. *(g)* But the existence of trust-funds is now held to be immaterial; and the inconvenience to the trustee of having to pay the expenses is just as little considered, because expenses are not awarded as in the nature of penalty, but as compensation to the successful party for the cost to which he has been put in establishing a right which his opponents

(e) *Jackson's Trs. v. Black*, 31 May 1832, 4 D. 618. See also *Home's Trs. v. Ralston*, 10 Sh. 597; *Melville v. Lady Preston*, 26 June 1841, 3 D. 1101. 13 June 1834, 12 Sh. 727.

(f) *Kirkland v. Oighton*, 3 Feb. 1842, 1822, 1 Sh. 271, N. E. 253; *Grant v. Gibson-Craig*, 30 May 1829, 7 Sh. 686.

(g) See *Gordon's Trs. v. Stewart*, 25 Jan.

ought to have known to be well founded. (h) Trustees, moreover, CHAPTER LXXV.
are subject to the same incidental rules with respect to expenses of
process and the conduct of litigation as other litigants. Execution
pending appeal will be issued against them in ordinary course. (i)
A trustee who is in the position of an undischarged bankrupt may
be compelled to find caution for expenses. (k) And a trustee, who
furnishes the means of prosecuting an action in the name of his
constituent, may be decerned against for expenses, *qua dominus*
litis. (l)

2427. Although, as we have seen in the previous chapter, an
action directed against parties *as trustees* will not authorise a per-
sonal decerniture, (m) and still less the execution of personal dili-
gence against members of the trust, (n) a different rule has been
sanctioned in regard to decernitures for expenses. In *White v.*
Wilson & Co. (o) the Court, in a suspension of a charge against
the individual trustee, without expressly deciding the general ques-
tion, found "that the chargers are entitled to payment of the sums
charged for out of any funds which are or ought to be in the hands
of the suspender as trustee." But in the subsequent case of *Kay*
v. Wilson's Trs., (p) the testamentary representatives of a truster
were decerned against personally for the expenses occasioned by
their defending an action for £1000 of damages for seduction, com-
mitted by their constituent, in which a verdict was given for £10,
although they pleaded exemption on the ground that they were
only concluded against as trustees; that the trust-estate was insuf-
ficient to meet the expenses; and that they were bound in duty to
resist a claim which was so greatly in excess of the sum actually
found to be due. It would appear, however, that a judicial factor
(who, as an officer of Court, acting under the authority of the
Court, stands in a less responsible position towards creditors) can-
not be made personally liable for the expenses of an action directed
against him in his official capacity. (q)

Personal de-
cerniture for
expenses may
be pronounced
in an action con-
cluding against
the trustees
collectively.

2428. The reports for the period of the last twenty years contain
a considerable number of cases upon the question of the liability

Liability of
trustees in
bankruptcy for
expenses.

(h) *Clyne's Trs. v. Alison*, 8 Feb. 1840,
2 D. 554; *Gibson v. Wilkie*, 25 May 1838,
11 Sh. 656; *Wylie v. Smith*, 15 Nov. 1834,
13 Sh. 40; *Sandeman v. Shepherd*, 4 July
1835, 13 Sh. 1037.

(i) *Robertson v. Morrison*, 4 Dec. 1828,
2 Sh. 553, N. E. 479.

(k) *Richmond v. Railton's Tr.*, 13 June
1850, 12 D. 1017.

(l) *Welsh v. M'Arthur*, 15 June 1826, 4

Sh. 710, N. E. 715; *Fleming v. Little*, 2
Dec. 1829, 8 Sh. 172.

(m) *Ross v. Heriot's Hospital*, 5 Bell, 37.

(n) *Gordon v. Campbell*, 13 June 1842,
1 Bell, 428.

(o) *White v. Wilson & Co.*, 2 March
1843, 5 D. 763.

(p) *Kay v. Wilson's Trs.*, 6 March 1850,
12 D. 845.

(q) *Ferguson v. Murray*, 20 Dec. 1853,
16 D. 260.

CHAPTER LXXV. of trustees in bankruptcy for the expenses of legal proceedings to which the trustees had sisted themselves as parties. It appears to have been considered at one time, that although a trustee sisting himself in a depending process might be liable for subsequent expenses, yet that, as to expenses already incurred, the contradictor stood in the position of an ordinary creditor, and was therefore only entitled to rank for a dividend.^(r) It is unnecessary, however, to enter into detail on this point, as it has since been fixed, by a judgment of the whole Court,^(s) that the successful party is entitled to payment of the whole of his expenses from the trustee, leaving the latter to obtain relief from the estate, if he can, by entering the disbursement as an item of discharge in his accounts.

Locus poenitentiae where trustee merely sists himself to make inquiry.

Trustees cannot sist themselves on condition of not being liable for expenses.

Trustee not liable for his constituent's expenses.

Expenses in reductions of trust-settlements.

2429. However, in the subsequent case of *Muir v. The Tay Insurance Co.*,^(t) it was held that a trustee upon the sequestrated estate of a bankrupt, who had merely sisted himself, and, after attending an examination of havers, abandoned the action, had not so completely adopted the suit as to subject himself to liability for expenses incurred before the sequestration; but that the previous expenses formed a claim against the bankrupt and the sequestrated estate only. Trustees cannot avoid universal liability for the expenses of process by proposing to sist under condition that they shall not be liable for expenses incurred prior to their appearance. It has been expressly decided that trustees, if they compare at all, must be sisted unconditionally.^(u) A trustee for creditors is not liable for the expenses previously incurred by the bankrupt's own agent. He may even uplift a consigned fund without deduction, and the agent can only rank for a dividend.^(x)

2430. We have still to notice a class of actions, very important as regards the liability of the trustees on account of the enormous expense attending them,—we refer to actions of reduction of trust-settlements. The effect of reduction being to destroy the title of the alleged trustees of the settlement altogether, it follows that

^(r) Compare *Kidd v. Brown*, 17 May 1828, 6 Sh. 825; *Grant v. Gibson-Craig*, 30 May 1829, 7 Sh. 686, and *Sandeman v. Shepherd*, 4 July 1835, 18 Sh. 1037, with *Cullen v. Fontaine*, 27 May 1831, 9 Sh. 637, and *Gibson v. Wilkie*, 25 May 1833, 11 Sh. 656.

^(s) *Torbet v. Borthwick*, 28 Feb. 1849, 11 D. 694; *Morrison v. Dundas*, 11 July 1809, F.C.; *Paterson v. M'Lelland*, *infra*; *Scott v. Pattison*, 21 Dec. 1826, 5 Sh. 172, N. E. 158.

^(t) *Muir v. Tay Insurance Co.*, 14 Feb. 1843, 5 D. 579. It has been observed,

that in decerning against a trustee for expenses of process (where it is meant that he shall himself be liable if there are not sufficient trust-funds), the proper form is to decern against him personally, and not as trustee; *Davidson's Trs. v. Carr*, 21 June 1850, 12 D. 1069.

^(u) *Buchanan v. Corbet, Borthwick, & Co.*, 15 June 1827, 5 Sh. 805, N. E. 745; *Sandeman v. Shepherd*, etc., 4 July 1835, 18 Sh. 1037.

^(x) *Peddle v. Davidson*, 17 July 1856, 18 D. 1806. See *contra*, *Paterson v. M'Lelland*, 4 June 1824, 3 Sh. 103, N.E. 68.

trustees defending a reduction could have no privilege in respect of their title as such, had the law been even less settled than it is in regard to the liability of trustees to persons *not claiming under the settlement*. Accordingly, in the latest case in which the question was raised, (y) it was ruled by a unanimous judgment of the Second Division, affirming Lord Kinloch's interlocutor, that trustees representing the interests of a married lady as liferenter and her children as fiars, were liable, in consequence of unsuccessfully defending a reduction of a trust-assignation, to account for the fund which was the subject of competition, without any deduction for the expenses of the action.

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Trustees are liable for maintaining a reducible deed. *Graham v. Marshall*.

2431. Lord Justice-Clerk Inglis(z) observed, that the argument, that trustees were entitled to indemnity for the expense of defending an invalid disposition in their favour, was an entire perversion of the ordinary rule, that trustees are entitled to be relieved from expenses incurred in defending the trust-estate or the trust-deed. That the unsuccessful parties were called trustees, did not affect the question; because there were other parties whose interests had been affected by the trust-assignation, and it was impossible, after they had successfully resisted the enforcement of that assignation, to hold that they ought to pay the expenses of the parties who had attempted to deprive them of their rights. The interests of minors were sufficiently protected by leaving their defence to their legal guardians, or, if necessary, by applying for the appointment of a tutor *ad litem*. "If," said his Lordship in conclusion, "trustees do not see that they are in safety to defend an action, it is quite competent, and not unusual, that they should appeal to the parties and say, 'Do you wish us to defend this action? because, if you do, you must furnish us with funds.' And nothing could be fairer than that the trustees should have so addressed Mr M. and his wife, who adequately represent all these parties; and if they declined to assist the trustees, then the trustees were quite entitled to allow decree in absence to go out; and I cannot see that any after liability could attach to them."

Opinion of Lord Justice-Clerk Inglis.

2432. This decision is in accordance with the principle established in *Chalmers v. Scott*,(a) where trustees under a disposition

Chalmers v. Scott.

(y) *Graham v. Marshall*, 22 Nov. 1860, 28 D. 41; cases of *Chalmers*, *Kirkpatrick*, and *Morrison*, *infra*; but see the cases in the note at the end of the chapter.

(z) 28 D. 48. As to the right of trustees to take part in litigation having relation to the validity of a will or trust-disposition, the determination of a question between heirs and executors, or other ques-

tion affecting the general interests of the trust, the law is not very well settled. See *Fairholme v. Fairholme's Trs.*, 5 Jan. 1859, 21 D. 205; *Boe v. Anderson*, 8 March 1862, 24 D. 732; *Lord Lovat v. Fraser*, 26 April 1866, 1 L. R. Sc. Ap. 24; 4 Macph. H. L. 88.

(a) *Chalmers v. Scott*, 23 June 1880, 8 Sh. 961. See *Kirkpatrick v. Irvine*, 18 June 1848, 10 D. 867.

CHAPTER LXXV. in trust for the establishment of a charity, respecting which there had been a considerable amount of litigation, and which was ultimately reduced by the granter as not being his deed, were found personally liable for the expenses of the litigation. This was certainly a case of hardship, because there were no beneficiaries from whom an indemnity could have been obtained, and there were strong grounds for contending that the ostensible granter of the deed ought to have been made to bear the expense of reinstating himself in his title to the property. However, the trustees were not necessitated to defend; and in the circumstances they ought to have declined the trust, and petitioned for the appointment of a judicial factor.

Reduction *ex capite lecti*.

2433. Even in a case of reduction *ex capite lecti*, where the validity of the conveyance could not be determined without a trial, the trustees were found liable by the First Division to account for the whole fund, without deduction of their own expenses, although the Court, moved by the remonstrances of Lord Mackenzie, altered the interlocutor of the Lord Ordinary in so far as it found the trustees liable to the pursuer for the expenses incurred *by him*.(b) There does not appear to be any precedent for condemning trustees to pay the expenses on both sides in cases similar to those under consideration. When trustees become parties to an action, with the object of defending the truster's settlements as a whole, it would appear, although the question is not free from doubt,(c) that they are entitled to their expenses, notwithstanding that *one* of the instruments upon which their title is founded is set aside or held to be inoperative.

Trustee entitled to the expenses of raising action of distribution; but not if he interferes as an active litigant.

2434. II. EXPENSES IN LITIGATION WITH PARTIES CLAIMING UNDER THE SETTLEMENT.—As trustees are entitled to be indemnified by the parties beneficially interested for the necessary expenses attendant upon the execution of the trust, it follows that, in the discussion of questions as to the relative interests of those parties, trustees do not, as a general rule, incur liability for the expense of bringing the case into Court. To understand the distinctions that have been taken in exceptional cases, it is necessary that we should distinguish between the position of a trustee who appears as holder of a fund, or for his own exoneration, and that of a trustee following out proceedings as an active defender. In the former class of cases, the rule is, that a trustee is not only not liable to successful claimants, but that he is entitled to retain out of the funds in his hands

Raiser's expenses.

(b) *Morrison v. Morrison's Trs.*, 28 Dec. 1848, 11 D. 297.

(c) Compare *Stainton v. Stainton*, 17 Jan. 1828, 6 Sh. 863, with *Graham v. Marshall*, 22 Nov. 1860, 28 D. 41.

his expenses as raiser, as well as those incurred in obtaining his discharge. (*d*)

2435. However, if an action of exoneration is rendered necessary, in consequence, not of any unreasonable refusal on the part of the beneficiaries to acquiesce in an extrajudicial settlement, but by reason of the fault of the trustee himself—as, for instance, in neglecting the duties of his office, whereby the trust-estate has been injured, (*e*) or its affairs have fallen into confusion, (*f*)—the trustee must bear the cost of his own exoneration, including, if necessary, the expense of a judicial accounting. On this principle, also, where a trustee had gone to reside in England, leaving the trust-papers in the hands of a co-trustee and beneficiary, and for several years took no part in the administration of the trust, and made no attempt to obtain authority to resign his office, the Court, while granting the prayer of a petition at his instance for recovery of the trust-papers, refused to give him the expenses of the application out of the trust-estate. (*g*) And where a trustee, instead of raising an action in his own name for distribution and exoneration, joined a beneficiary as an active litigant in a process of count and reckoning against his co-trustee, which was afterwards withdrawn, the Court refused to award him the expenses of a subsequent action in his own name for the purposes of distribution and exoneration. (*h*)

Trustee not entitled to expenses if litigation be the result of his own fault.

2436. As it would be contrary to equity that the share of a succession falling to an individual legatee should be absorbed or diminished by the expense to which he has been necessarily put in asserting his right, it follows that trustees resisting a claim in a multiplepointing are not entitled to charge their expenses against the individual legatee. (*i*) We have already seen that it is no part of the duty of a trustee to interfere in a question of competition be-

Expense of resistance to a successful claim not a charge against that claim.

(*d*) *Neilson's Trs. v. Peacock*, 14 Dec. 1822, 2 Sh. 89, N. E. 80; *Cumming v. Hay*, 28 Feb. 1884, 12 Sh. 508; *Taylor v. Noble*, 24 May 1886, 14 Sh. 817; *Dunbar v. Sinclair*, 14 Nov. 1850, 18 D. 54; *Kirkland v. Oughton*, 8 Feb. 1842, 4 D. 618. See chap. 68 (Discharge of Trustees), where the subject of judicial exoneration is more fully discussed.

(*e*) See the cases on Liability in the preceding chapter.

(*f*) *Hill v. Hill*, 15 Jan. 1856, 18 D. 816, and see 17 D. 1104; *Kerr's Trs. v. Moody*, 19 June 1850, 12 D. 1041; *Presbytery of Dundee v. Mags. of Dundee*, 28 Feb. 1868, 1 Macph. 478. The party found liable was a judicial factor, but the principle is the same in both cases.

(*g*) *Hill v. Hill*, *supra*. See *Nicol v. Cameron*, 19 June 1829, 7 Sh. 777.

(*h*) *Fotheringham v. Saltoun*, 8 Feb. 1852, 14 D. 427. See also *Smith v. Telford*, 29 June 1838, 16 Sh. 1228, where it was laid down by Lord Fullerton, that trustees are liable to the beneficiaries if they, *from over-scrupulousness or obstinacy*, engage in litigation, occasioning great and unnecessary expense, which it would be unjust to impose on those holding the beneficial interest in the trust.

(*i*) *Cameron v. Anderson*, *infra*; *Murray v. Johnston*, 24 March 1881, 9 Sh. 681. As to the right of the beneficiary to claim his expenses, see chapter 76.

CHAPTER LXXV. tween beneficiaries. By so doing, he will most probably involve himself in personal liability to claimants; (k) though, in some special cases, trustees litigating in good faith, and having no personal interest in the result of the competition, have been allowed expenses out of the estate. (l) According to the existing practice, trustees are entitled to be represented at a debate in a competition between beneficiaries, and may charge watching fees in their accounts against the trust-estate.

Expenses of
necessary liti-
gation in a
foreign court.

2437. Trustees or guardians entering into litigation in a foreign Court, in vindication of the powers with which they are invested by the laws of their own country, for the protection of the personal property of a minor, are entitled to claim their expenses out of the minor's estate. (m)

Liability of
legatees;

2438. The general proposition, that the trustee's expenses in an action for distribution and exoneration form a charge against the trust-estate, implies, of course, that if the residuary estate be insufficient to meet the expense, it must be defrayed by the legatees in rateable proportion. (n)

and of trustees
for creditors.

2439. The claims of competing creditors under a voluntary trust fall to be dealt with on the same footing as those of beneficiaries under a gratuitous settlement. Accordingly, the trustee's expenses for *bona fide* opposition to a preferable claim form a charge against the estate, though not against the successful competitor. (o) If there are no surplus funds available, the trustee will not be personally liable for the claimant's expenses, unless he has acted in collusion with the bankrupt, or has been guilty of professional impropriety. (p) In virtue of his right to indemnity, he is entitled, even in a question with a preferable creditor, to retain the amount of his expenses necessarily or profitably incurred in the administration of the trust. (q)

(k) *Murray v. Johnston*, *supra*.

(l) *Cameron v. Anderson*, 12 Nov. 1844, 7 D. 92.

(m) *Johnston v. Beattie*, 29 Jan. 1856, 18 D. 848; *Stuart v. Stuart* (Marquis of Bute's case), 17 May 1861, 4 Macq. 1; and see *Stewart v. Campbell*, 12 Feb. 1880, 8 Sh. 512.

(n) *Cameron v. Anderson*, 12 Nov. 1844, 7 D. 92.

(o) *Carsewell v. Munn's Trs.*, 21 June 1832, 10 Sh. 677; *Cleghorn v. Gordon*, 16 Jan. 1827, 5 Sh. 208, N. E. 187. In connection with the claims of creditors, we may direct attention to the important question whether a trustee in bankruptcy, requiring and obtaining delivery of the

bankrupt's title-deeds from his agent (subject to his lien), incurs personal liability to the agent. The true principle seems to be that if the trustee has, on behalf of the estate, taken benefit by the delivery of the titles, he is bound to give effect to the lien, and is liable for neglecting to do so on the principle explained, *supra*, § 2358. See *Rennie & Webster v. Myles*, 8 Feb. 1847, 9 D. 619; and the authorities cited in Lord Cuninghame's Note.

(p) *Schuurmans v. Goldie*, 7 March 1829, 7 Sh. 559. See *Cabbel v. Miller's Trs.*, 8 July 1828, 6 Sh. 1101; *Bell v. Wright*, 19 Nov. 1842, 5 D. 162.

(q) With respect to the expenses of competitions among beneficiaries, the later

practice is to award expenses against the unsuccessful party in a multiplepointing, just as in any other suit; and this is fair, because there is no reason why a party claiming a fund to which he is not entitled should be provided with the means of doing so at the expense of his opponent. The cases in which it appears from the reports that the expenses of competitions have been allowed out of the trust-estate, are of no value as precedents, unless it, the report, also states that the liability of the estate for expenses was disputed; for such interlocutory findings as to expenses are frequently pronounced on the authority of a statement at the bar, that the parties had agreed to lay the joint expense of the discussion upon the estate. The grounds upon which expenses are allowed out of trust-estates to the unsuccessful

parties are, either that the deed is challengeable upon some general ground, such as uncertainty, the effect of which cannot be determined without having recourse to judicial proceedings, *Miller v. Black's Trs.*, 14 July 1837, 2 S. & M.L. 866; or that the provisions of the settlement are ambiguous, and that litigation is necessary to secure the title of the successful party, *Ramsay's Trs. v. Ramsay*, 12 Feb. 1836, 14 Sh. 472; *Duguid v. Dundas*, 8 Feb. 1839, 1 D. 473; *Grieve's Trs. v. Bethune*, 9 June 1830, 8 Sh. 896. In *Morrison's Trs. v. Nisbet*, 30 June 1829, 7 Sh. 810, the pursuer of a reduction of a settlement, on the ground of an error in the testing clause, was found entitled to his expenses out of the estate; but this decision would not now be regarded as a precedent.

CHAPTER LXXVI.

OF ACTIONS BY BENEFICIARIES, AND
DEFENCES THERETO.(a)

Married women.

2440. I. TITLE TO SUE AND TO DISCHARGE.—It seems to be sufficient, in point of title, that the pursuer of an action against trustees, for the vindication of an equitable interest, should be rationally capable of conducting a suit, although to certain effects subject to civil incapacity. Accordingly, it has been laid down by our institutional writers, and confirmed by decision, that a married woman may sue for the enforcement of the stipulations in her favour contained in her marriage-contract, without the concurrence of her husband, more especially if the husband refuses his consent.(b) In *Blair v. Burns*,(c) which was an action by a married woman, in her own name, against the creditors of her ancestor for count and reckoning in relation to her succession, it was objected that she had no title to sue, as her husband declined to lend his instance to the action. The Court appointed a curator *ad litem*, and found that she was entitled, with his concurrence, to insist in the action, to the effect of recovering the subject of the inheritance or its *surrogatum*. In *Graham v. Stewart*,(d) which is a more direct authority on the point, a married lady, living in family with her husband, was held entitled to sue the trustees of her mother's settlement, in her own name, for damage resulting from the fault of their professional advisers, in investing the trust-funds upon insufficient security. In other cases, married ladies have been held entitled to sue for their provisions, with a curator *ad litem*, where the trustees at whose instance execution ought to pass declined to interfere.(e) There can be no

(a) On the subject of jurisdiction, reference is made to chapter 2, section 7.

(b) Ersk. 1, 6, 21; *Marshall v. Marshall*, 1628, M. 6086; *Hacket v. Gordon*, 1678, M. 6039; *Byers v. Husband's Crs.*, 1708, M. 6045; *Scott v. Paton*, 1708, M. 6050; *Macpherson v. Mackintosh*, 1778, M. 6052.

(c) *Blair v. Burns*, 17 Dec. 1829, 8 Sh. 264.

(d) *Graham v. Stewart*, 4 March 1831, 9 Sh. 548.

(e) *Wishart v. Wishart*, 7 D. 125, 12 May 1887, 2 S. & M.L. 564; *Smith v. Smith*, 11 Jan. 1868, 4 Macph. 279. On

doubt that the administrative jurisdiction of the Court may be put in motion by a married woman presenting an application, in her own name, in relation to her own estate. (*f*)

2441. The curator or administrator-in-law of a minor is, in right of his office, entitled to concur with the minor in all actions necessary for the protection of the interests of his ward; and the same power belongs to the tutor, or other guardian, of a pupil or insane person suing in his own name. (*g*) But whether a guardian or administrator-in-law be entitled to insist for payment of his ward's share of a trust-succession, is a question which does not wholly depend on the authority of the guardian, but partly on the intention of the truster. If the powers of the legal guardian in relation to the trust-estate are not excluded (as they may be, either by appointing the trustees curators of the succession, or by directing them to hold the estate until the majority or marriage of the beneficiaries), it would seem that the trustees may with propriety pay over the share of a minor beneficiary to the curator or administrator-in-law, provided his circumstances are such as to leave no doubt as to his responsibility, or that the responsibility is guaranteed by a cautioner. Trustees paying to a curator, who has not found caution for the discharge of the duties of his office, incur a personal responsibility in the event of the fund being lost. (*h*) It may be doubted whether the trustees would not be entitled to require additional security before paying over to a curator any funds considerably in excess of the amount for which caution was found at his appointment.

2442. In *Dumbreck v. Stevenson* (*i*) the House of Lords, recognising the authority of the older cases, held that trustees were justified in paying over a minor's share of succession to his father, as administrator-in-law, upon the security of two responsible cautioners. Lord Campbell expressed an opinion, that although the poverty of the father might not be a sufficient reason for refusing payment or requiring caution as a condition of payment, yet, where there was insolvency or embarrassment of circumstances, the trustees would not be justified in making payment to the father without security. (*k*)

the other hand, the discharge of a married woman, granted *stante matrimonio*, will not exonerate the trustees if the money were paid to the husband; *Mayne v. M'Keand*, 4 June 1835, 13 Sh. 870.

(*f*) *Pet. Primrose*, 9 March 1850, 12 D. 917.

(*g*) See the subject treated in *Fraser, on Parent and Child*, 164-8.

(*h*) *Donaldson v. Kennedy*, 18 June 1833, 11 Sh. 740.

(*i*) *Dumbreck v. Stevenson*, 11 Feb. 1861, 4 Macq. 86, affirming 19 D. 462; *Wilkie v. L. of Dalziel*, 1688, M. 16,311; *Graham v. Duff*, 1794, M. 16,388. See Lord Justice-Clerk Inglis's observations in *Robertson, Petr.*, 12 July 1865, 3 Macph. 1077.

(*k*) 4 Macq. 87; *Govan v. Richardson*, 1633, M. 16,263.

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Trustees vested with a discretionary power are not bound to denude in favour of the curator.

2443. Where, by the terms of a trust-deed, a discretionary power was given to trustees of applying trust-money for the maintenance or benefit of a person under curatory, who was already sufficiently provided for, it was held that the trustees were entitled to retain the money as a guarantee fund, and they were accordingly assoilzied from the conclusions of an action for payment at the instance of the curator.^(l) A deaf and dumb person, being *sui juris*, is, like any other beneficiary, entitled to require trustees holding property for his behoof to denude on the arrival of the period of distribution.^(m)

Creditors.

2444. Creditors entering appearance in a multiplepounding as claimants of a riding interest in their debtor's trust money, are entitled to have decree of preference pronounced in their own names, notwithstanding that the trustee of their interest has been made a

Mandatories.

party to the process.⁽ⁿ⁾ A claimant in an action of distribution, who has been found entitled to a share of the fund *in medio*, may insist in the action without a mandatory, notwithstanding his absence from the country, if the share of the fund to which he has been found entitled be sufficient to secure the contingent expenses.^(o)

Form of action for trying questions of right.

2445. II. FORM OF ACTION.—Next, as to the kind of action by means of which the beneficiary may establish his claim. It is settled that the Court will not dispose of a question as to the right of a beneficiary upon a summary application, *e.g.*, for the appointment of a factor.^(p) But an agent employed to uplift a specific fund may be compelled, by summary petition in the Inferior Courts, to make delivery of the proceeds to his constituent.^(q) A multiplepounding is, of course, the appropriate form of action for trying any question resolving into a competition for funds in the hands of trustees.^(r) But, if the question is, in form, one between the trustee and the beneficiary, raising an issue either as to the constitution of the trust or of the right claimed,^(s) or as to the existence of free

Multiplepounding.

^(l) *Moncrieff v. Usher*, 15 Nov. 1861, 24 D. 49.

^(m) *Craigie v. Gordon*, 17 June 1837, 15 Sh. 1157. And see *Pet. Kirkpatrick*, 8 June 1853, 15 D. 734.

⁽ⁿ⁾ *Macfarlane v. Cranston*, 12 Dec. 1838, 2 Sh. 578; *Stainton v. Stainton's Trs.*, 25 Jan. 1850, 12 D. 572, as to the rights of a marriage-contract creditor.

^(o) *Buik v. Patullo*, 8 Mar. 1855, 17 D. 568.

^(p) *Harvey v. Lacy*, 7 July 1836, 14 Sh. 1112.

^(q) *Graham v. Lang*, 20 Feb. 1850, 12 D. 754.

^(r) See *Union Bank v. Ferguson*, 19 Feb. 1857, 19 D. 482. *Sed quære*, Whether such a form of action is appropriate for the trial of a question as to the heritable or moveable quality of estate, in a question between the beneficiary's heirs and executors? *Great North of Scotland Ry. Co. v. Gauld*, 8 July 1863, 1 Macph. 1053.

^(s) *Middleton v. Mitchell*, 21 Dec. 1843, 6 D. 816; *Moncrieff v. Bethune*, 1 June 1844, 6 D. 1100; *Crokat v. Lord Panmure*, 8 June 1858, 15 D. 737; *Lord Gray v. Paterson*, 1 Dec. 1854, 17 D. 117.

estate, (t) or of personal liability on the part of the trustee, (u) an CHAP. LXXVI.
 action of multiplepoinding at the instance of the beneficiary would
 seem to be incompetent, as in these cases there is, properly speak-
 ing, no double distress. A question of right between beneficiaries
 and trustees is, in general, most conveniently raised by a declarator
 of trust. Count and reckoning is the appropriate form where the Count and
reckoning.
 trustee denies the existence of available funds; (x) and questions of
 liability may be tried either in the form of a count and reckoning,
 or under a petitory action concluding for damages, or for payment, Damages.
 if the claim is for a legacy or liquid obligation. (y) The Court will
 not entertain an action to determine a future and contingent right, (z)
 or to try by anticipation the validity of an attempted exercise of a
 power of disposal. (a) It has been said that the denial of the bene-
 ficiary's right by the parties in possession of the property, gives
 the beneficiary a title to have that right declared; (b) but this seems
 to be too strongly stated: it is only when something is done or
 threatened, that may interfere with his contingent interest, that the
 beneficiary is entitled to ask the Court to take cognisance of it.

2446. The trustee of a continuing trust may, of course, be ordained Remedy in the
event of a trus-
tee refusing to
invest.
 to invest money in terms of the settlement; (c) but, as such a decree
 cannot be specifically enforced by diligence, the beneficiaries' remedy,
 in case of refusal, is by an application to the Court for the removal
 of the trustee and the appointment of a judicial factor. Questions
 as to the liability of parties to marriage-contracts, *e.g.*, under an
 obligation to invest, are sometimes raised by means of a charge
 given upon the clause of registration. But the Court will not en-
 courage resort to such a summary mode of redress where there is
 any *bona fide* question, whether of law or of fact, in the case. (d)

A legatee or beneficiary is entitled to constitute his claim Constitution of
claims.
 against the estate by decree, although there may be a deficiency of
 free funds, or that the title is under challenge. (e)

(t) *Frere v. Western Bank, infra*; *Nimmo v. Murray*, 14 May 1868, 1 Macph. 791.

(u) For example, questions as to the exercise of a discretionary power cannot be raised in the form of a multiplepoinding; *Gregorson v. Macdonald*, 14 Feb. 1842, 4 D. 678. See *Carmichael v. Todd*, 2 Mar. 1853, 15 D. 473.

(x) *Frier v. Western Bank*, 19 Feb. 1855, 18 D. 272.

(y) *Robertson v. Mackenzie*, 14 June 1854, 26 Jur. 498. See *Carron Co. v. Stainton*, 27 Jan. and 27 June 1857, 19 D. 818, 982; *Home v. Mackenzie*, 10 July 1845, 7 D. 1010. If the action is against a *cautioner* of the trustee, negligence on the part of co-trustees or commissioners is not a relevant de-

fence; *Biggar v. Wright*, 19 Nov. 1846, 9 D. 78.

(z) *Baillie v. Seton*, 16 Dec. 1853, 16 D. 216; *Ferrie v. Ferrie*, 23 Feb. 1849, 11 D. 704.

(a) *Harvey v. Harvey's Trs.*, 28 June 1860, 22 D. 1310.

(b) *Mackenzie v. Hanbury*, 1 July 1846, 8 D. 964; and see *Provan v. Provan*, 14 June 1840, 2 D. 298.

(c) *Forsyth v. Kilgour*, 13 Dec. 1854, 17 D. 207.

(d) See *Muir v. Mackersy*, 21 Dec. 1853, 16 D. 289.

(e) *Bazett & Co. v. Heugh's Trs.*, 29 Nov. 1826, 5 Sh. 50, N. E. 47; *Mure v. Gilmour*, 23 May 1851, 18 D. 986.

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Source of the
beneficiary's
preventive
rights.

Examples of
interdict against
abuse of powers.

Interdict against
abuse of powers
by public trust-
tees.

2447. The right of the party beneficially interested in a trust-estate to restrain the exercise of a power by interdict, is a necessary incident of the proprietary right which, as we have seen, belongs to the beneficiary under a trust-disposition. This right, however, cannot be exercised except with the sanction of the Court. Accordingly, the remedy is by interdict, not by inhibition. (*f*) Apparently, the first reported case is that of *Nisbet v. Grahame*, (*g*) where a proprietor, having granted a trust-disposition of his estate for behoof of creditors, and having afterwards, on the allegation that the deed had been impetrated by force and fear, recalled the trust, and granted a new disposition with powers of sale to another party, who took infestment,—the Court, pending the discussion of the question as to the validity of the second trust, granted interdict against the trustee exposing the property to sale. In a subsequent case, (*h*) where the Court, on a consideration of the merits of the application, refused to interdict a trustee from the execution of the power of sale, and the case was taken by appeal to the House of Lords, the Court, in the exercise of its powers of interim regulation pending appeal, (*i*) passed a new bill of suspension and interdict pending the appeal. In another case, where trustees vested with a power of sale for the payment of debts had sold a portion of the estate, realising a sum which was *prima facie* sufficient for payment of the trust-debts, interdict was granted against the sale of the remainder of the property until the trustees had rendered a proper account of their intromissions. (*k*) So also, interdict has been granted to prevent a sale by a heritable creditor at an insufficient upset price, to the injury of a postponed creditor. (*l*)

2448. In another class of cases, interdict has been granted against the contemplated acts of parliamentary trustees in excess of the powers conferred on them by Statute, (*m*) among which we may include the cases where trustees have been interdicted from applying the trust-funds towards the expense of applying to Parliament for an extension of their powers. (*n*) In *Sauers v. Mon-*

(*f*) *E. of Lauderdale v. E. Fife*, 9 March 1880, 8 Sh. 675; *Hamilton v. Henderson*, 20 May 1857, 19 D. 745.

(*g*) *Nisbet v. Grahame*, 9 Feb. 1822, 1 Sh. 807, N. E. 285.

(*h*) *Innes v. Innes*, 18 Dec. 1828, 7 Sh. 206.

(*i*) *Innes v. Innes*, 18 June 1829, 7 Sh. 762.

(*k*) *Pender v. Ferguson*, 17 Nov. 1881, 10 Sh. 19.

(*l*) *Kerr v. M'Arthur's Trs.*, 28 Dec. 1848, 11 D. 801. See, as to the powers of

trustees in trusts for sale, chap. 64, sect. 1, and particularly § 2009.

(*m*) *Menzies v. Duff*, 30 June 1827, 5 Sh. 884, N. E. 821; *Todd v. Clyde's Trs.*, 29 Nov. 1848, 6 D. 108; *Tullis v. Maga. of Edinr.*, 18 Dec. 1847, 10 D. 261; *Taylor v. Com. of Police for Kilmarnock*, 5 Feb. 1858, 20 D. 501.

(*n*) *Mackintosh's Trs. v. Mackintosh*, 30 June 1852, 14 D. 928; *Brown v. Adam*, 19 Feb. 1848, 10 D. 744; *Attorney-Gen. v. Andrews*, 2 M'N. & G. 225. But the Court will not restrain the trustees from proceeding

teith, (o) a note of suspension and interdict at the instance of a beneficiary holding a contingent interest in a trust-estate against an intended payment to another beneficiary, which was alleged to be in breach of trust, was refused, on the ground that the trust-funds remaining in the hands of the trustees were sufficient to secure the interest of the applicant. However, it cannot be doubted, that if a sufficient case for judicial interference were shown, a beneficiary might protect his interest by interdict against ultroneous payments on the part of the trustees.

2449. Interdict is also a competent remedy in prevention of the abuse of the trustees' ordinary powers of administration; as examples of which, we may refer to the cases where trustees have been interdicted from taking infetment in defraud of the rights of preferable creditors; (p) from accepting the resignation of a co-trustee in opposition to the wishes of the beneficiaries; (q) and from carrying on proceedings before foreign courts of law, to the injury of the estate. (r) Interdict against abuse of ordinary powers.

2450. An executor *qua* next of kin, who may be regarded as combining the characters of trustee and beneficiary, has obviously the right of calling his co-executors to account for their intromissions. He has also a direct action against the debtors to the executry estate for his own share of the assets. (s) Assumed trustees, although not personally responsible for the intromissions of their predecessors in the trust, are liable, as trustees, to render accounts embracing the management of their predecessors as well as their own, (t) and are not entitled to a discharge until they have called their predecessors to account. (u) Responsibility of assumed trustees.

2451. Where trust-estate has been fraudulently sold or transferred by a trustee, the beneficiary is entitled to set aside the transaction, and to recover the specific estate, if the purchaser knew of the fraud, or had the means of knowing from the titles of the subject that the trustee had not power to sell. (x) Relief against fraud.

2452. III. DEFENCES TO ACTIONS UPON RIGHTS OF SUCCESSION.—

with a bill before Parliament at their own risk; *Anstruther v. East of Fife Ry. Co.*, 19 April 1852, 1 Macq. 98.

(o) *Sawers v. Monteith*, 29 Nov. 1861, 24 D. 101.

(p) *Tatnall v. Reid*, 2 Feb. 1827, 5 Sh. 277, N. E. 258.

(q) *Reid v. Maxwell*, 6 Feb. 1852, 14 D. 449.

(r) *Young v. Barclay*, 27 May 1846, 8 D. 774; *British Linen Co. v. Marquis of Breadalbane*, 24 Dec. 1836, 15 Sh. 356;

Dawson's Trs. v. Maclean, 4 Feb. 1860, 22 D. 685; *Carron Co. v. Stainton*, 27 Jan. 1857, 19 D. 318; *M'Cubbin v. Veining*, 3 Dec. 1859, 22 D. 164; and see chapter 2, sect. 7, *supra*.

(s) See the cases cited, chap. 54, sect. 8.

(t) *Sommervill's Trs. v. Wemess*, 8 Dec. 1854, 17 D. 151.

(u) *Nicol v. Wilson*, 10 June 1856, 18 D. 1000.

(x) *Macgowan v. Robb*, 29 March 1864, 2 Macph. 948.

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Let us now consider the different defences which may be stated by trustees in answer to a claim against the trust. The most frequent grounds of defence are—(1) that there never was any available fund for division; (2) that the fund has been lost without fault on the part of the trustees; (3) that the provision has been paid to some other person supposed to be the party in right of it; or (4) that the estate has been wound up, and all claims upon it extinguished by prescription or lapse of time. The first of these defences raises an issue of accounting depending upon matters of fact; the second raises the issue of personal liability, which we have elsewhere discussed. The defences of *bona fide* payment to the wrong person, and of *mora*, remain to be considered.

Bona fide payment.

2453. The defence of *bona fides* assumes that the payment was made to a person erroneously supposed to be the creditor. The liability of trustees to pay to the real creditor is determined by the principle that, on the one hand, error in law is not admitted as an excuse, while, on the other hand, a *bona fide* payment made to a person supposed to be in fact the creditor, is excusable if the debtor had not the means of discovering the error. For example, payment to a party confirmed as nearest of kin, but who in point of fact was not the nearest of kin, has been sustained in respect of the evidence afforded by the title of confirmation.(y) And, on the same principle, a purchaser at a judicial sale has been held justified in paying the price to creditors ranked preferably to the claimant, under error in fact.(z) But payment to a widow, unconfirmed, of her legal provisions, is not a sufficient defence to an action at the instance of executors; and conversely, if a trustee apply the rents of an estate forming heritable succession in payment of the claims of creditors, instead of selling a portion of the lands, he is liable in an action at the instance of the widow for the value of her terce, reserving his right of relief against the heir.(a) On the same principle, where trustees had paid a portion of the sum due under a moveable bond to the creditor's widow, believing it to be moveable as to succession (although by Statute 1661, chap. 32, such bonds remain heritable as to the interests of husband and wife), the husband's representative, suing nearly forty years after the succession opened, was held entitled to repetition.(b)

(y) *Stewart v. Earl of Orkney*, 1713, M. 1796; *Paterson v. Paterson's Exrs.*, 1626, M. 1786; *Thomson v. Mowbray*, 1676, M. 1791. But see *Howes v. Goodlet Campbell*, 1758, M. 1799.

(z) *Mackie v. Dunbar*, 1628, M. 1788.

(a) *Cowan v. Kerr*, 15 Dec. 1830, 9 Sh. 188. And see as to claims for meliorations

and the limitation of liability for interest, where an error has been committed by trustees in the administration of heritable estate, *Douglas v. Douglas' Trs.*, 20 July 1864, 2 Macph. 1879; 7 June 1867, 5 Macph. 827.

(b) *Gray v. Walker*, 11 March 1859, 21 D. 709. Some observations on the plea of

2454. The principle, that reasonable evidence on a matter of CHAP. LXXVI.
fact is sufficient to protect trustees against a claim for repetition, Payment under errors in fact.
 is illustrated by the case of *Bruce v. Robson*,^(c) where trustees of a settlement, under which the truster's son had right to a share of the succession, paid a debt of £100, due by the son, out of the funds supposed to belong to him in virtue of the settlement. The son had disappeared four months before the truster's death, and was not again heard of. Twelve years after, an action was raised by the truster's next of kin, as resulting beneficiaries, in which it was agreed by all the claimants that the distribution should take place on the footing that the truster's son had predeceased him; and, in the accounting, the next of kin claimed repayment of the sum of £100, on the ground that the succession had never vested in the son. But the Court were unanimously of opinion that, as the debt was paid before the presumption for life had been overcome, the trustees were entitled to take credit for the payment.

2455. In another class of cases, where payments or conveyances have been made by trustees under circumstances tantamount to a devolution of the trust,—as, for example, where trustees have conveyed estate to a husband, which they were bound to secure to the wife, exclusive of the *jus mariti*;^(d) or have conveyed it to the truster, or to a trustee for his creditors, without securing the interests of preferable creditors or beneficiaries,—the Court have held the trustees responsible for the breach of trust.^(e) And so, if a trustee holding personal estate, upon trust to entail the residue after payment of the truster's debts and legacies, execute an entail in pursuance of his powers, without reserving a sufficient sum for satisfaction of the truster's obligations, the personal creditors or legatees have direct recourse against the trustee in consequence of the breach of trust.^(f) If trustees merely *invest* money in name of the wrong party, retaining the securities in their hands, as the fund is still within their control, the mistake may be rectified at the sight of the Court, matters being still entire.^(g) When trustees are liable for erroneous payments.
Error as to investment may be corrected.

2456. It remains to be considered, under what circumstances and in what manner the beneficiary's right of action may be extin- Prescription of beneficiary's right of action after funds have been paid away.

Fruges bona fide perceptæ et consumptæ will be found in the chapter on the Administration of Trusts for Sale, chapter 64, section 8, to which reference is accordingly made.

^(c) *Bruce v. Robson*, 25 Feb. 1834, 12 Sh. 486.

^(d) *Mayne v. M'Keand*, 4 June 1835, 13 Sh. 870; *Ross v. Allan's Trs.*, 18 Nov. 1850, 13 D. 44.

^(e) See *Freen v. Beveridge*, 28 June 1882, 10 Sh. 727, 12 Sh. 141; *Mackenzie v. Thomson*, 12 Nov. 1846, 9 D. 35. But see *Jeffrey v. Ure*, 21 June 1825, 1 W. & S. 565.

^(f) *Cruikshank v. Cruikshank*, 24 April 1845, 4 Bell, 179; *Fraser v. Fraser*, 8 Dec. 1826, 5 Sh. 104, N. E. 96.

^(g) *Buik v. Patullo*, 6 June 1854, 17 D. 44.

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guished by lapse of time. Like all other rights, a beneficial interest may be lost by adverse possession for the prescriptive period of forty years; (*h*) but the possession of the trustees is not adverse possession, because it is possession upon the title on which the beneficiary claims, and for his behoof. But if the fund have been actually distributed or paid away, the right of action against the trustee may, of course, be cut off by the negative prescription; and the only question that can arise in such cases is as to the period from which prescription runs.

From what
period pre-
scription runs.

2457. On this point the cases of *Barns v. Barns' Trustees* and the *Earl of Eglinton's* case, decided by Lord Jerviswoode in 1861, are instructive. (*i*) The circumstances were as follows:—In the first case, the truster, who died in 1791, had directed his trustees to invest the free residue of his estate in land, to be entailed upon certain conditions. Having realised the trust-funds, the trustees, with concurrence of the then beneficiaries, purchased an estate, the price of which exceeded the amount of the funds by £4000; and, in order to provide for payment of the balance of the price, they retained the estate in their hands, paying over the surplus rents to the heirs of entail from time to time, but without rendering any detailed account of their intromissions, or denuding of the estate. In 1853, being more than forty years after the completion of the purchase by payment of the first instalment of the price, an action of accounting and payment was raised by the beneficiaries, in which the purchase was challenged as being in excess of the powers conferred by the settlement. The trustees admitted their liability to account, but pleaded the negative prescription in bar of any objections to the purchase. The First Division, by a majority, sustained the plea of prescription, on the ground that the transaction was known to the beneficiaries, and that their acquiescence for forty years brought the case within the ordinary rule by which competing titles are cut off through the operation of the long prescription. In the *Earl of Eglinton's* case (*k*) the question arose in the form of a defence to an action concluding that the proprietor of an entailed estate was entitled to acquire the property in fee-simple; the ground of defence being, that whereas the trustees had been directed to execute a valid deed of entail of a certain estate, they had executed an entail which was defective in one of the statutory prohibitions. The pursuer pleaded that the estate had been possessed by himself

(*h*) See the Statutes 1469, cap. 28; 1474, cap. 54; and 1617, cap. 12. *Eglinton & Ora.*, 28 March 1861, 23 D. 1869.

(*i*) *Barns v. Barn's Trs.* 5 March 1857, 19 D. 626; *Earl of Eglinton v. Earl of* (*k*) 23 D. 1869

and his ancestors for more than forty years upon the defective entail; and his possession under that title was held to have the effect of cutting off any right of action in the heirs-substitute to compel the heir in possession, or the representatives of the trustees, to execute a valid entail in terms of the truster's directions.^(l)

2458. It will be observed, that in both the leading cases the question at issue substantially resolved into a competition between claimants having opposing interests in the succession; and the practical result of the decisions is, that trustees who have denuded of the estate committed to their charge are relieved, by the operation of the negative prescription, from liability by reason of error in the execution of the duty of distribution. But, as we have already explained, it is not therefore to be inferred that trustees retaining the trust-estate in their *own hands* would be in a position to plead the negative prescription in defence to an action of denuding. In the class of cases already adverted to, the foundation of the plea of prescription was a beneficial conveyance to a third party. In this class of cases, it will be observed, that the trustees are themselves barred by prescription from claiming relief from their disponent; and it would not be consonant to equity that a beneficiary, who had allowed prescription to run upon the trustee's right of indemnity, should be permitted to enforce *his* right by a personal action against the trustee. But there can be no *equitable* exception to a claim directed against trustees for the payment of funds retained in their own hands; and as their title of possession is, in its own nature, a qualified title, it appears to us that prescription could never be pleaded upon such a title in answer to a beneficiary whose claim is not adverse to the trustee's title, but founded upon it. This principle appears to have been recognised in *Ogilvy v. Erskine*,^(m) though the decision turned partly on the feudal doctrine, that where a party possesses on two titles, both unlimited (*i.e.*, fee-simple titles with destinations over), prescription does not run in favour of the destination in the conveyance upon which his title is made up, and against the destination in the other title.

Trustees cannot plead prescription on their own possession against the beneficiary.

2459. Such appears to have been the opinion of the judges who

Cases of prescription under a subsisting trust.

(l) See *Pollock v. Lockhart*, 10 March 1779, 2 Pat. 495, affirming M. 10,702; *Kinloch v. Rocheid*, 1800, M. "Prescription," App. Nos. 4 & 7; *Paul v. Reid*, 8 Feb. 1814, F.C.; and *Lindsay v. Balgonie*, 1627, M. 10,718, where prescription was held to apply to a claim under a testament. In the case of *Henderson v. Burt*, 16 Jan. 1858, 20 D. 402, it was held that prescrip-

tion did not run on an annuity from the date of the settlement, but that arrears beyond the period of forty years were cut off by prescription.

(m) *Ogilvy v. Erskine*, 26 May 1887, 15 Sh. 1027. This case is not noticed in Mr Ross' Cases, though it must certainly be regarded as a leading authority in the law of prescription on double titles.

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decided the case of *Barns v. Barns' Trustees*; for, while supporting the specific purchase in respect of the title, which was by the negative prescription secured to the heirs of the investiture, their Lordships were at pains to explain⁽ⁿ⁾ that they did not discover, either in principle or in the authority of the case of *Kinloch v. Rocheid*, founded upon by the defenders, any reason for extending the operation of the negative prescription to a claim of general accounting directed against the trustees of a *subsisting trust*.^(o) It remains to be seen in what sense the expression "subsisting trust" will be construed with reference to claims of the nature here referred to. We incline to think that, notwithstanding the elapse of the period appointed by the settlor for the execution of his declared purposes, the trust must be held to subsist where the trustees have funds in their hands, and the trust purposes in relation to those funds remain unexecuted.^(p)

Prescription
may be barred
by trustee's
acknowledg-
ment.

2460. In any view of the effect of the law of prescription, it is obvious that the trustees of an unexecuted trust are entitled to protect the beneficial interest against prescription by executing an acknowledgment of the trust. Such an acknowledgment is necessarily binding upon the trustee and his heirs, and no other party can have any interest to object to it. On this ground the Second Division, in the case of *Briggs v. Swan's Executors*,^(q) unanimously repelled a claim, at the instance of the next of kin of a deceased trustee, for repetition of a sum paid by his executors to the beneficiaries after prescription had run upon the trust. The executors had acknowledged their liability, as his representatives, to account to the beneficiaries, in the state of accounts rendered to the Board of Inland Revenue with reference to the legacy-duty exigible from the estate of the deceased trustee; and this acknowledgment was held equivalent to a declaration of trust.

Mora and
taciturnity.

2461. The principles which determine the applicability of the

⁽ⁿ⁾ See the opinion of Lord Colonsay, 19 D. 687, and of Lord Deas, 651. Also *Univ. of Aberdeen v. Irvine*, 26 March 1868 (in H. L.).

^(o) Where the element of fraud enters into the case, it is clear that the defence of prescription cannot be maintained in answer to a claim of accounting. See Lord Brougham's observations in the case of *Irvine v. Kirkpatrick*, 7 Bell, 217.

^(p) The case of *Baird and Others v. Mags. of Dundee*, 24 D. 447 (8 March 1868, 1 Macph. H. L. 6; 4 Macq. 228), does not seem to invalidate the proposition stated in the text. The question

there was as to the right to compel the Magistrates of Dundee, as trustees of a charitable endowment, to divest themselves of certain trust-estate alleged to have been diverted from its proper uses in the 17th century. It was held that, as the property had been conveyed to a different body, namely, the Magistrates and Town Council, the administrative title of that corporation was fortified by the negative prescription; but that the estate in its hands was affected by all the conditions of the trust.

^(q) *Briggs v. Swan's Exrs.*, 24 Jan. 1854, 16 D. 385.

plea of *mora* and taciturnity to actions against trustees, are similar to those which have been the subject of consideration in connection with the law of prescription. If a legatee lie by for any length of time, and allow the trustee to distribute the funds amongst other parties, or to contract debt on the security of the estate, (r) without giving notice of his claim, he is justly held to have lost his recourse against the trustee by neglecting to insist for his interest at a time when the estate (which, in a sense, may be said to be primarily liable for the fulfilment of the trust-purposes) might have been made available to him. This was the principle of the cases of *Munro* and *Cullen v. Wemyss*, (s) and the earlier cases. (t) But it is plain that taciturnity is not pleadable in bar of the beneficiary's claim where his case is founded either on the fact of the trustees having funds in their possession, (u) or that he himself was previously unaware of the provisions of the trust under which his right has arisen. (x)

2462. Although an action for a breach of trust may undoubtedly be barred by taciturnity for such a length of time, and with such a full knowledge of the circumstances, as amount to homologation of the illegal transaction, yet a discharge of the trustee from liabilities of this kind is not so easily implied as a discharge of an action for debt, which is the character of an ordinary action by a legatee against an executor. For example, in actions of reduction of purchases of trust-estate by trustees, it is held that mere lapse of time will not exclude the beneficiary's right to redress. (y)

Homologation
of breach of
trust not readily
inferred.

(r) *Galloway v. Grant*, 21 Feb. 1851, 18 D. 756.

(s) *Cullen v. Wemyss*, 16 Nov. 1838, 1 D. 82; *Munro v. Munro*, 17 Dec. 1825, 4 Sh. 828, N. E. 332. Here an heir, who had acknowledged the right of trustees by possessing a farm for several years on a missive from them, was held to be barred from claiming the lease in his character of heir. See also *Urquhart v. Urquhart*, 14 July 1853, 1 Macq. 658, 18 D. 742. In an unreported case of this description in the Second Division, *Milligan v. Walker*, 7 March 1862, considerable weight was allowed to the pleas of taciturnity and lapse of time.

(t) See *Thomson v. Murray*, 19 Nov. 1824, 8 Sh. 297, N. E. 209; *Scott v. Mitchell*, 27 May 1880, 8 Sh. 820; *Todd v.*

Beattie, 12 Nov. 1802, Hume, 487; *Wilson v. Wilson*, 1788, M. 11,646.

(u) *Seath v. Taylor*, 21 Jan. 1848, 10 D. 377.

(x) *Allan v. Allan's Trs.*, 24 June 1851, 18 D. 1220. And see *Gray v. Walker*, 11 Mar. 1859, 21 D. 709; *Gourlay v. Wright*, 28 June 1864, 2 Macph. 1284. In the English case of *Farrant v. Blanchford*, 82 L. J. Ch. 107, the elapse of ten years from the period when the beneficiary attained majority was held not to bar his right to relief in equity against a breach of trust, in the circumstances of the case.

(y) *York Buildings Co. v. Mackenzie*, 18 May 1795, 8 Pat. 378; *Jeffrey v. Aiken*, 16 June 1826, 4 Sh. 722, N. E. 728; *Taylor v. Watson*, 20 Jan. 1846, 8 D. 400; *Gillies v. M'Lachlan*, 11 Feb. 1846, 8 D. 487.

CHAPTER LXXVII.

SUGGESTIONS AS TO TAKING INSTRUCTIONS FOR
THE PREPARATION OF WILLS.

2463. We propose, as introductory to the supplementary part of this treatise, to offer a few suggestions for the use of practitioners in taking instructions for the preparation of settlements. The duty resting on an agent in taking instructions for testamentary deeds is a very delicate as well as a responsible one; and we are afraid its importance is often not sufficiently appreciated. The duty of the agent is often rendered more onerous by the indecision in many cases, and the almost entire ignorance in others, on the part of the testator, as to how, and the particular terms in which, he shall leave his means; and not infrequently the settlement is as much the will of the agent as of the maker.

2464. Frequently the agent, without making any inquiry as to the position of the testator's means, the manner in which they are affected by marriage-contracts or other deeds of a family nature, or without explaining the legal rights of husband and wife, or children, or of the heir-at-law, by the operation of the law of deathbed, simply ascertains the wishes of the testator, and embodies them in a settlement; and this settlement is signed by the maker without much explanation, and without any very distinct understanding on his part of the real effect of the clauses which it contains. It is the duty of the agent, however, in many cases, not only to draw, but to advise and explain; remembering that the testator's intention can only be truly elicited by having presented to his consideration the arrangements most suitable to his views and circumstances. To the right discharge of his duty as a professional adviser, it is not enough that the solicitor is conversant with the various modes of disposition in which the law allows a testator to direct the enjoyment of his property; it is essential that he should also be informed as to the circumstances of the testator's family, and the situation of his fortune. To a want of complete information on these points

we must attribute many of the inconvenient schemes of testamentary disposition which are met with in practice. Were the legal rights, which the maker cannot by any act of his own disappoint, the consequences resulting from the operation of the law of death-bed, and the real effect of the expressions used in testamentary deeds, especially in questions of life interest and fee and vesting, carefully explained in all instances, we are satisfied that very many of the numerous litigations which are raised upon the meaning and proper construction of trust-settlements would be prevented.

2465. It is, of course, impossible to make suggestions to meet every variety of circumstances. The duty of an agent must to a great extent depend upon the circumstances of each particular case; and we shall only notice what we consider to be the agent's duty under the circumstances which most frequently occur in practice.

1. When the maker of the settlement is married, the agent ought to ascertain whether he or she has entered into a marriage-contract, and, if such a deed exists, to ascertain the terms of its provisions. He will thus be able to explain what effect these provisions have upon the power of disposal of the maker, and to take distinct instructions with these provisions in view. He should also ascertain whether the maker has any power of disposal of any fund of which he or she may not have the absolute property, in order that such a power may be specially dealt with, and any question as to whether it is sufficiently exercised by the execution of a general settlement obviated. He should also ascertain whether there is any property in England or abroad; and if there is English property, he should introduce into the dispositive clause the words "devise, legate, and bequeath."

Inquiry to be made as to property subject to conditions of marriage-contract;

or of which the testator has the power of disposal.

2. Should there be no marriage-settlement, the agent should explain the legal rights of the husband or wife, and of children, and the impossibility of these rights being limited by a testamentary settlement.

Testator should be made aware of the legal rights of the family.

3. Having ascertained how the testator's means are affected by marriage-contract or other deeds, and explained the rights which cannot be disappointed, it should be the object of the agent to apprehend distinctly the wishes of the testator, and to carry these into effect; and in doing so, many explanations will require to be given as to the meaning and effect of various clauses usually inserted in settlements. We shall advert to some of those of most frequent occurrence.

Ascertainment of the testator's intention regarding the destination of his property.

2466. (1) The first provision of a settlement generally contains a direction for payment of debts. In the case where an heritable

Payment of debts.

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Marriage-con-
tract provisions,
whether to be
dealt with as
debts.

Destination of
the subject of
legacy on failure
of legatee.

Liferent and
fee.

Mode of effec-
tuating the tes-
tator's intention.

Whether fee to
be contingent on
survivorship of
the liferenter.

Residuary
bequests.

Application of
annual proceeds.

property, appointed to be conveyed to a special legatee, is burdened with debt, it should be ascertained whether the debt is to be paid out of the general estate ; or, in other words, whether it is to be considered a debt included in the first purpose of the settlement, or whether it is to form a burden upon the property. If there are marriage-contract provisions, it should also be ascertained whether these are to be paid as debts or to be held as satisfied by the provisions of the testamentary settlement, in order that the wishes of the maker in this respect may be given effect to.

(2) In the case of simple legacies, the agent ought to ascertain whether, in the event of the legatee predeceasing the maker, the subject of the bequest is to pass to the legatee's heirs and assignees, to his issue only, or to the residuary legatees ; and, where legacies are left to two or more persons, he ought to inform himself as to whether the survivor or survivors are to succeed, should any of them predecease, or if the heirs of predeceasers are to take a joint interest along with the survivors, and if so, to provide accordingly.

(3) In regard to provisions of liferent to parents and fee to children *nascituri*, the wishes of the maker should be carefully ascertained. We believe that in provisions of this nature the intentions of the maker have not infrequently been frustrated by the carelessness or ignorance of the agent, or from the real wishes of the maker not having been clearly understood. The agent should know whether the maker intends that the liferent shall be a life-rent use, or whether it is to be a liferent only in form and a fee in its operation and effect. It must be remembered that, according to the most recent decision of the House of Lords, the creation of a trust is not sufficient to preserve a fee for unborn children, either alone or in conjunction with those born in the testator's lifetime, unless the destination is either restricted to a liferent use *allienary*, or that the trustees are directed to retain the fund under their control during the subsistence of the liferent. The conveyancer will be careful to prevent any question as to the right to the fee conferred upon the children, by declaring whether all the children born of the liferenter, although some of them should predecease him, are to participate in the fee ; or whether only those children who survive the liferenter and the period of division, and the children of those who may predecease, are entitled to do so, and the proportions in which they are to succeed.

2467. (4) But perhaps the instructions attended with most difficulty, and which require the greatest care, are those which relate to residuary bequests. Frequently a liferent is given to one party and the fee to another or other parties. Sometimes the annual pro-

ceeds are directed to be applied for a particular purpose during a certain period, or for a time dependent upon circumstances, with an ultimate destination of the fee; and it is in reference to the proper construction of these provisions, or provisions of a similar kind, that litigation has most frequently arisen. There can be no doubt that if the difficulties connected with the destination of contingent interests and the ascertainment of the period of vesting, were fully explained to the makers of testamentary deeds, and their intention as to the period of vesting accurately ascertained, litigation would be much less frequent in reference to residuary bequests. It is desirable that, in every case where a question of vesting is likely to arise, the intention of the testator as to when the vesting of the fee is to take place should be ascertained by his agent, and provision made for carrying out his wishes in language as to the meaning of which there can be no misconception. Too much reliance ought not to be placed upon a clause declaratory of the period of vesting; for it must be remembered that the vesting of a contingent interest is in most cases necessarily determined by the conditions of the destination, and, in a case of repugnancy, the testator's express disposition of his estate must override any declaration of intention. From the cases examined at the beginning of this volume, it will be seen that litigation in regard to the vesting of residuary bequests has most frequently resulted from uncertainty as to the period to which words of survivorship are to be referred. In all cases where an interest is to be given to survivors or to a conditional institute, it should be clearly stated whether the property is to pass in the event of the legatee surviving the testator, or in the event of his surviving the prior legatee, or finally, in the event of his outliving the period of distribution. A testator, while he postpones the period of vesting, may wish to give the legatee a power of disposal or division among his children should he predecease, and special inquiry and provision should be made as to this.

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Duty of agent
to ascertain
testator's inten-
tion in relation
to vesting.

2468. The mode of giving expression to the usual reciprocal institution of survivors and the issue of predeceasing legatees deserves more attention than it has hitherto received. The decision of the House of Lords in *Buchanan v. Young* will remind the practitioner that issue do not take along with survivors unless expressly instituted. There are two modes of expressing the usual destination to a family, equally correct in principle, but not always identical in legal effect; namely, (1) by a joint destination, without substitutions; and (2) by a destination in specified shares, with substitutions. Under the first, the testator gives the property, for example, "to the surviving children of A. B. and (or jointly with) the issue

Destination to
children of a
family, or joint
legatees, how to
be framed.

CHAP. LXXVII. of any of his children who may predecease ;” adding a declaration that the division is to be *per stirpes*. This form can only be used when the shares of all the children are to vest at one and the same time, *e.g.*, at the majority of the youngest ; and when those shares are equal. The other form of destination to which we have referred, consists of three purposes : (1) a destination to the children in equal (or unequal) shares ; (2) a substitution of the *issue* of each child to that child’s original share ; and (3) a destination over to the surviving children jointly with the issue of predeceasing children, in the event of any other child dying *without* issue. Each of these three purposes must be distinctly expressed—not left to implication ; otherwise the testator’s intention may be frustrated.

Revocation of
prior settle-
ments.

2469. (5) If the maker has already executed a settlement, the agent ought to inform himself as to whether the maker wishes that settlement to take effect in the event of the new settlement becoming ineffectual by the law of deathbed ; and if such should be his intention, the agent will, of course, take care not to insert a clause of revocation in the new settlement.

Law of death-
bed.

(6) Should the maker be labouring under disease when the settlement is executed, the law of deathbed and the right competent to the heir should be explained to him, and he should be recommended to go to kirk or market as soon as practicable after executing the settlement, if his health permits him to do so.

Powers of
trustees.

(7) As to the powers to be conferred on the trustees, the maker of the settlement will in most cases be disposed to be guided by the advice of his agent. In the forms of testamentary settlements which follow, we have been solicitous to include examples of all the powers likely to be required in ordinary practice. Circumstances must determine how far it is advisable in any particular case to give a wide discretion to trustees. The duration of powers in private trusts should not be longer than is necessary for the purpose of providing for the exigencies of the testator’s family, or those to whom he stands in *loco parentis*. Hence, as a general rule, a discretionary trust should not be kept up for the benefit of grandchildren. Care should also be taken, in framing a trust-settlement, to distinguish between a power of sale and a direction to sell ; although, since the changes in the law as to succession-duties, the risk of litigation in consequence of ambiguity in this particular has been greatly diminished.

2470. We think we have noticed the principal points to which the attention of an agent should in ordinary cases be directed. There are, of course, many special cases requiring the attention of the agent. For example, when the maker has a family, some of

whose members have attained majority, it should be ascertained whether pecuniary advances have been made to any of the family, and, if so, whether they are to be imputed as part payment of the provisions under the settlement. In the case where the maker is a partner of a private company, it should be pointed out to him that his executors are bound to realise his interest with as little delay as possible ; and should he wish his partners to have time to pay out his share, special provision ought to be made to that effect. If the maker is proprietor of minerals which have not hitherto been worked, and if the trust created by the settlement is to be one of considerable endurance, the expediency should be brought under his notice of conferring ample powers upon the trustees in relation to the working and leasing of the minerals. But the duty of the agent in all special cases must of course depend upon the circumstances of each case ; and he should make it his object to inform himself of all the circumstances in regard to which specific provision may be necessary, and to bring them under the notice of the maker in order that his wishes may be ascertained and carried into effect.

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Advances, whether to be debited to account of children's provisions.

Partnership interests, how to be dealt with.

Mineral subjects.

STYLE NO. 1.

STYLES OF TRUST-SETTLEMENTS AND COLLATERAL DEEDS.

SECTION I.

STYLES OF TESTAMENTARY DISPOSITIONS.

No. I.—*General Settlement, conveying whole estate to one person, under burden of legacies in different forms.—Exclusion of jus mariti of the husbands of beneficiaries.—Note as to conveyance in fee and liferent.*

Absolute disposition of whole estate

Nomination of donee as executor.

Donee to pay testator's debts.

I, A. B. of X., being desirous of settling the succession to my means and estate, so as to prevent disputes after my decease, do therefore GIVE, GRANT, ASSIGN, DISPONE, CONVEY, and MAKE OVER [*if English property is intended to be included, insert after "dispone,"—*DEVISE, LEGATE, and BEQUEATH] to and in favour of C. D. of Y., and his heirs and assignees, heritably and irredeemably, All and Sundry lands, tenements, heritages, goods, gear, debts, and sums of money, and in general the whole estate, heritable and moveable, real and personal, which shall be belonging and owing to me at my decease [*should no special provision be intended as to a fund of which the maker has the power of disposal, the following clause may be added:* including any fund of which I may at the time of my decease have the power of disposal], together with the whole rents, interest, dividends, profits, and produce thereof, and the writings, title-deeds, vouchers, and instructions of the premises: AND I hereby NOMINATE and APPOINT the said C. D. to be my sole executor and universal intromitter with my moveable means and estate, with power to give up inventories thereof, confirm the same if needful, and generally to do everything competent to the office of executor: BUT THESE PRESENTS are granted, and shall be accepted by the said C. D., and the foresaid lands and other heritages hereby conveyed are disposed with and under the burden of the payment of my whole just and lawful debts, and sickbed and funeral charges, and of the payment of the following legacies, which I leave and bequeath

to the parties after named—viz. : FIRST, To my nephew, E. F., the sum of £ sterling, whom failing to his issue, equally among them ; SECOND, To each of G. H. and I. K. the sum of £ sterling, and failing both or either of them, leaving issue, then the sum provided to them or him shall be paid to such issue equally among them *per stirpes* ; and in the event of the decease of either of them without leaving issue, then the sum provided to such deceiver shall be paid to the other of them, whom failing, leaving issue, to such issue equally among them *per stirpes* ; THIRD, To each of the three daughters of my uncle, M. N., the sum of £ sterling, and failing all or any of them, leaving issue, the sum provided to them or her shall be paid to their or her issue equally among them *per stirpes* ; and in the event of the decease of any of them, without leaving issue, then the sum provided to such deceiver shall be paid to the survivors or survivor jointly with the issue of the other who may have predeceased leaving issue, such issue being entitled equally to the share to which their parent would have been entitled if in life ; (a) and in the event of the decease of two of them without leaving issue, then the sum provided to such deceasers shall be paid to the survivor, or to the issue of the one who may have died leaving issue, equally among them *per stirpes* ; all which legacies shall bear interest from the first term of Whitsunday or Martinmas after my decease until paid ; FOURTH, To the Society of [*insert the designation of the society as accurately as possible*] the sum of £ to be paid at the first term of Whitsunday or Martinmas after my decease, with interest from that term until paid, which legacy shall be paid to the secretary or treasurer of that institution for behoof thereof, whose receipt shall be sufficient exoneration for the same ; and also under burden of any other legacies which I may hereafter bequeath by any codicil or signed memorandum expressive of my intention : And I appoint the said C. D., his heirs and assignees, to be my residuary legatee or legatees : AND I PROVIDE and DECLARE that the whole bequests hereby made, so far as in favour of or descending upon females, shall be expressly seclusive of the *jus mariti* and right of administration of husbands, and shall not be affectable by their debts or deeds, or by the diligence of their creditors : AND I further PROVIDE and DECLARE that such of the foregoing bequests as are in favour of parties who may be in pupilarity or minority at the period of payment, may be paid to their legal guardians for their behoof : AND I RESERVE my own liferent use and enjoyment of the premises, and full power and authority to me, at any time of

STYLE NO. I.

Disposnee burdened with legacies.

Legacy to two persons jointly.

Legacy to three or more persons jointly.

Conditional institution of issue.

Legacy to a charitable institution.

Appointment of residuary legatee. Exclusion of *jus mariti*.

Legacies may be paid to guardians.

Reserved power to revoke.

(a) For abridged forms of joint legacies, with reciprocal substitutions in favour of issue, see Style No. IV, p. 588.

STYLE NO. I. my life, and even on deathbed, to cancel or alter these presents at pleasure: AND I DISPENSE with delivery hereof, and declare these presents, although lying by me or in the custody of any other person at my death, to have the full effect of a delivered evident, any law or custom to the contrary notwithstanding: AND I CONSENT to registration for preservation.—IN WITNESS WHEREOF, etc.

Delivery.

Registration.

NOTE.—Sometimes, when a testator wishes to settle his estate upon one party in liferent and the children of that party in fee, he executes a settlement disposing his estates to the liferenter “in liferent for his liferent use allenary, and to his children in fee;” but property meant to be settled in this manner can be most effectually secured by means of a trust, and is so settled in practice. Examples of the manner in which the object of the settlor in the case under consideration is carried out by means of a trust, will be found in Styles No. IV. and No. V.

STYLE NO. II. No. II.—*General Settlement conveying whole estate to two or more parties jointly.—Conditional institution of issue.*

Absolute disposition to four persons, with destination.

Disponees burdened with testator's debts.

Appointment of executors.

I, A. B. of X., in order to settle the succession to my estate, real and personal, after my decease, and for other good causes and considerations, do hereby GIVE, GRANT, ASSIGN, DISPONE, CONVEY, AND MAKE OVER, to and in favour of my brothers C. and D., and my sisters, E. and F., equally, and to their respective issue *per stirpes*, equally among them, and failing any of them without leaving issue, then to the survivors of the said C., D., E., and F., and the lawful issue of any of them who may have predeceased me (the division being *per stirpes*), All and Sundry lands, tenements, heritage, goods, gear, debts, and sums of money, and in general the whole estate, heritable and moveable, real and personal, now owing and belonging, or which shall be owing and belonging to me [*see No. I. as to where there is a power of disposal*] at the time of my decease; together with the whole rents, interests, dividends, profits, and produce of the premises due at my decease, or to become due thereafter, and the writings, title-deeds, and securities of the same: BUT SUBJECT ALWAYS to the burden of payment of all my just and lawful debts, sickbed and funeral charges: AND I hereby NOMINATE and APPOINT the said C., D., E., and F., and the survivors or survivor of them, to be my sole executors and executor, and universal intromitters and intromitter with my whole moveable sub-

jects and estate, with power to give up inventories, confirm the same if needful, and in general to do everything which to the office of executor belongs: And I declare [*as in Style No. I.*]

STYLE NO. II.

No. III.—*Mutual General Settlement by Spouses, conveying whole Estate to the Survivor absolutely.—Variations upon the clause reserving right to revoke.*

STYLE NO. III.

We, A. B. of X., and Mrs C. D. or B., spouses, for the love, favour and affection we bear to each other [*if the power of revocation is intended to be restricted, say—*In consideration of the provisions herein contained, granted by each of us in favour of the other, and for other good and onerous causes], do therefore, with mutual advice and consent, GIVE, GRANT, ASSIGN, and DISPONE to and in favour of the survivor of us, and the heirs and assignees whomsoever of the survivor, All and Sundry lands, tenements, and heritages, and also all debts, sums of money, and effects, and in general all estate, heritable and moveable, real and personal, wheresoever situated, now owing and belonging, or that shall be owing and belonging to the first deceiver, with the whole writings, vouchers, and securities, and the rents, interest, profits, and produce of the premises: And we respectively bind and oblige our heirs-at-law and executors to make up titles if required, and to grant, execute, and deliver all writings necessary and requisite for vesting the estate of the first deceiver in the person of the survivor: AND we NOMINATE and APPOINT the survivor to be the executor of the first deceiver, excluding all others from that office: BUT THESE PRESENTS are granted, and shall be accepted by the survivor and his or her foresaids, under the burden of the payment of the whole just and lawful debts, sickbed and funeral charges, of the first deceiver: RESERVING always to us and each of us full power to alter, innovate, or revoke these presents, in whole or in part, as we may see proper: But dispensing with the delivery hereof, and declaring always that the same, so far as unaltered or unrevoked as aforesaid, shall be effectual, though found lying by either of us at death, or in the custody of any other person, any law or custom to the contrary notwithstanding: And we consent to the registration hereof in the Books of Council and Session, or other Judges' books competent, therein to remain for preservation; and thereto constitute procurators.—IN WITNESS WHEREOF, etc.

Mutual disposition to survivor and heirs.

Survivor appointed executor.

Disposnee burdened with debts.

Reserved power to alter. [See note.]

NOTE.—If each party is only to be entitled to revoke so far as

STYLE NO. III. regards his or her own estate, the clause of revocation may be expressed in the following terms:—

Power to each party to revoke his own part.

“RESERVING to us full power and liberty to alter or revoke these presents at pleasure, so far as regards the estate hereby conveyed by us respectively.”

If it is intended that, in the event of either party exercising the power of revocation, he or she shall not take under the mutual deed, the following words may be added:—

Party exercising power of revocation to forfeit reciprocal provisions.

“PROVIDING that, in the event of either party exercising the power of revocation hereby reserved, then the interest of the party so revoking, conferred by the other of the said parties, in the means and estate hereby conveyed, shall cease and be held to be also revoked.”

SECTION II.

STYLES OF TRUST SETTLEMENTS *MORTIS CAUSA*.

STYLE NO. IV. No. IV.—*Settlement of whole Estate, with discretionary powers as to realisation, in trust for payment of debts and legacies, and distribution of residue amongst Testator's family: interests to vest at majority or marriage. Additional annuity to Widow. Examples of simple and joint bequests with conditional institutions; specific legacies; legacy in fee and life, with powers of division and restriction, etc. Special destination of heritable subjects. Residuary destination. Special powers of advancement and restriction of Children's interests. Form of special clause of immunity.*

General conveyance to trustees.
English property.

I, A. B. of X., for the settlement of my succession during my life, and in order to prevent disputes thereanent after my decease, do hereby GIVE, GRANT, ASSIGN, DISPONE, CONVEY, and MAKE OVER [*where English property is meant to be conveyed, add the words, “DEVISE, LEGATE, and BEQUEATH”*] to and in favour of

and to any other person or persons whom I may hereafter nominate and appoint, or who may be lawfully assumed into the trust, and to the acceptors and survivors and acceptor and survivor of them, the major number of them accepting and surviving, and resident in Great Britain, from time to time being a quorum, and to the heirs of the longest liver of them, as trustees and trustee for the ends, uses, and purposes after mentioned, and to the assignees of the said

trustees, or their said quorum, All and Sundry lands, tenements, tacks, heritages, debts, goods, gear, effects, and sums of money, shares in trading or other companies, stock-in-trade, and in general the whole subjects and estate, heritable and moveable, real and personal, owing and belonging, or which shall be owing and belonging to me [*see provision in regard to power of disposal in Style No. I.*] at my decease, with the rents, interest, profits and produce, and writings, titles, and vouchers thereof.—[*A special conveyance of the truster's heritable estate to the trustees is not now expedient, as their title may be completed by notarial instrument.*]
Special conveyance.
 —AND I NOMINATE and APPOINT the said trustees and their foresaids to be my sole and only executors and executor, and universal intromitters and intromitter with my personal means and estate, with full power to give up inventories thereof, and confirm the same at pleasure, and generally to do everything pertaining to the office of executor:
Nomination of executors.
 BUT THESE PRESENTS are granted, and are to be accepted by my said trustees and their foresaids in trust, with the powers and privileges, and for the ends, uses and purposes following, viz.: THAT THEY may, as they are hereby authorised and empowered to do, call, sue for, realise, uplift, receive and discharge the whole means and estate, debts and effects due and belonging, or which may be due and belonging to me at my decease: THAT THEY may continue to carry on, for behoof of my estate, and for such period and on such terms as they may think expedient, any business in which I may be engaged at my decease, either by myself or in company with others: THAT THEY may make such arrangements and settlements relating to my shares and interest in any business in which I may be interested along with others, as they may think advisable, and may allow the said shares and interests to remain in the hands of my surviving partners or partner for such period or periods, and on such terms, as they in their sole discretion shall think conducive to the interest of my estate [*see variation on this clause in Style No. VI.*]: THAT THEY may adjust and settle the extent, nature and boundaries of any property which may belong to me, or in which I may be interested along with others; that they may enter into such arrangements and submissions or arrangements as they may deem proper, or as may be necessary for dividing, or may themselves agree on such terms as they may think proper for dividing, any property in which I may have a joint interest: WITH POWER to sell, or concur in selling, realising, and converting into money, any lands, minerals, or other heritages, as well as any personal estate or effects, belonging to me or in which I may be interested, and that either by public roup or private bargain, and in whole, or in such lots and for such price or prices or other consi-
Declaration of trust and special powers.
Power to realise;
to carry on business;
to enter into arrangements with partners;
to settle boundaries of estate, and to divide.
Power of sale.

STYLE NO. IV.

STYLE NO. IV.	deration as they may think proper; that they may work or concur in
Power to work minerals. Power to let.	working, the mines, metals, and minerals in the said lands and heritages: THAT THEY may let or concur in letting the said lands and heritages, or mines, metals and minerals therein, or the said moveables, or any part or portion thereof, for such period and on such
To borrow on security;	terms as they may think proper: THAT THEY may borrow money to such extent as they may think proper for the purposes of the trust upon my lands and estate, and grant bonds and dispositions in security over the same therefor, containing powers of sale and all other
to raise and prosecute actions.	usual and necessary clauses: THAT THEY may raise, commence, and follow forth all actions, suits, and diligences, and grant all deeds and writings of whatever nature and description that may be necessary for carrying the powers foresaid, or any of them, into effect, binding my estate in absolute warrandice: AND I PROVIDE and DECLARE
Trustees to have power to grant valid discharges.	that the receipt of my said trustees shall be a sufficient discharge to all parties dealing and transacting with them in their character of trustees, and that such parties shall have no concern with or right to inquire respecting the application of monies paid by them to my trustees or the management of my means and estate: AND
Beneficiary or partner may be purchaser of trust-estate.	I further PROVIDE and DECLARE that any partners or partner with whom I may be associated, and any of the beneficiaries under my settlement [<i>if any of them are trustees there may be added here</i>
General discretionary power to compromise, refer, or settle question as to a disputed succession.	“notwithstanding that they or he may be trustees or a trustee under these presents”] may be an offerer for, and purchaser of my heritages and effects, or any of them, at such price and on such terms as my trustees may think proper, whether at public or private sale: AND WHEREAS I am entitled to certain provisions under the settlements of the deceased C. D. of Y., in reference to whose succession certain questions have arisen, my trustees may, and they are hereby authorised and empowered, not only to settle, uplift, and receive my whole right and interest in the estates of the said deceased C. D., and receive all payments, dispositions, and conveyances that may be necessary, but also to compromise my claims upon the said estate, and take part for my whole right and interest thereon, and for that purpose to enter into any submission or reference they may think proper for the purpose of ascertaining my right and interest therein, or in any way relative thereto, or to make such arrangements with the trustees acting under the settlements of the said deceased C. D., and the beneficiaries under the same, in relation to my rights and interests therein, as they may in their discretion consider conducive to the interests of my estates, or desirable for saving litigation; and specially, without prejudice to the said generality, my said trustees may relinquish such

portion of my claims and interests in the said estate as they may think proper; concur in any arrangement with the beneficiaries, or any of them, in the said estates, which they in their sole discretion may consider beneficial; and may make such payments, or enter into such obligations, binding my estates in absolute warrandice in regard to my rights and interests in the said estates, as they in their sole discretion may consider beneficial: AND my said trustees and executors shall HOLD and APPLY my means and estate, and the produce and proceeds thereof, so far as realised, for the ends, uses, and purposes following—viz.: IN THE FIRST PLACE, in payment of all my just and lawful debts, sickbed and funeral charges, and of the expenses of executing this trust; which debts, charges, and expenses my said trustees may pay without requiring legal constitution: IN THE SECOND PLACE, in implement, so far as the same may not have been implemented, of the provisions contained in my antenuptial contract of marriage with M. N. or B., dated the _____ day of _____: IN THE THIRD PLACE, in payment to the said M. N. or B., my wife, in the event of her surviving me, of a free yearly annuity of £ _____ sterling during all the days and years of her life, in addition to the annuity provided to her by the said antenuptial contract of marriage; beginning the first term's payment of the annuity hereby provided at the term at which the first term's payment of the said annuity provided by the said antenuptial contract of marriage is payable, and payable at the terms, in manner, and with interest and penalty, as is provided in the said antenuptial contract of marriage, with regard to the said annuity thereby provided to the said M. N. or B.: BUT DECLARING that, in the event of the said M. N. or B. entering into a second marriage, the said annuity hereby provided to her shall be reduced and restricted to the sum of £ _____ *per annum*, beginning the first term's payment of the said restricted annuity at the first term of Whitsunday or Martinmas occurring after her second marriage, and payable, the said restricted annuity, at the terms, in the manner, and with interest and penalty as provided with regard to the said annuity of £ _____ hereinbefore provided to her: AND WHICH ANNUITY, and restricted annuity, hereby provided to the said M. N. or B. shall be alimentary, and not affectable by her debts or deeds, or attachable by the diligence of her creditors: IN THE FOURTH PLACE, in payment to Mrs E. B., my mother, in the event of her surviving me, of a free yearly annuity of £ _____ sterling during all the days and years of her life that she shall survive me, payable at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's pay-

STYLE NO. IV.

Purposes of trust.

1. Payment of debts and expenses.

2. Implement of marriage-contract provisions.

3. Additional annuity to testator's widow,

restrictable on second marriage,

and declared alimentary.

4. Alimentary annuity to testator's mother.

STYLE NO. IV. ment thereof at the first term of Whitsunday or Martinmas occurring after my death for the half-year succeeding, and the next term's payment at the term of Whitsunday or Martinmas thereafter, and so forth, half-yearly, termly, and continually during all the days and years of her life, with one-fifth part further of each term's payment in name of liquidate penalty in case of failure in the punctual payment thereof, and the interest of each term's payment, at the rate of £5 per cent. *per annum*, from the time the same becomes due till payment; which annuity hereby provided to the said Mrs E. B. shall be strictly alimentary, and not affectable by her debts or deeds, or attachable by the diligence of her creditors:

5. Payment of legacies. **Simple legacies.** **Joint legacies.** **To children of a family.** **To a society.** **Specific legacies.** **Legacy in fee and liferent;**

IN THE FIFTH PLACE, in payment of the following legacies and bequests: (1) To E. E. the sum of £ ; (2) To F. F., whom failing to his lawful issue *per stirpes*, the sum of £ ; (3) To G. G., and his heirs and assignees, the sum of £ ; (4) To H., I., and K., children of L. L., equally, and to their respective issue *per stirpes*, and failing one of them without leaving issue who survive me, then to the survivors of the said H., I., and K., or to the survivor of them, jointly with the issue of the other who may have predeceased me leaving issue who survive me, or to the surviving issue of the other two should they both predecease me and leave issue who survive me (the division being *per stirpes*), and failing two of them without leaving issue who survive me, then to the survivor, or the issue of the one who may predecease me leaving issue who survive me (the division among such issue being *per stirpes*), the sum of £ ; (5) To the children of M. N. who may survive me, jointly with the issue of any of them who may predecease me, such issue being entitled equally among them *per stirpes* to the share to which their parents would have succeeded if in life, the sum of £ ; (6) To each of the children of P. Q. who may survive me, the sum of £ , and the like sum of £ to the issue *per stirpes* of any child of the said P. Q. who may predecease me; (7) To the Society of the sum of £ , to be paid to the treasurer or secretary of the said society for behoof thereof, whose receipt shall be a sufficient exoneration to my trustees; (8) To R. R. and his, etc. [*as in previous numbers*], all the Number Two Guaranteed Stock of the S. and T. Railway Company which I may possess at the time of my decease; and also any one of the pictures that may be in my house at X. at the time of my decease, to be selected by the said R. R.; (9) I LEAVE and BEQUEATH the sum of £ to V. W. in liferent, for her liferent alimentary use allenary and to her children in fee, subject to the destination and under the conditions after mentioned; and I direct

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with power of advancement.

Destination of fee to the surviving children, with reciprocal institution of issue;

term of payment;

anticipation of payment.

6. Special destinations of heritable estate.

my said trustees either to pay the same to the said parties for their respective interests of liferent and fee ; or, if they shall deem it more expedient, to invest the sum hereby bequeathed in their own names, and apply the annual income and produce for behoof of the said V. W. in liferent, for the alimentary liferent use of herself, and also of such of her children as may remain in family with her until they respectively attain to majority or are married ; BUT PROVIDING that they shall be entitled to apply the whole, or such part of the principal as they may think proper, for the alimentary support and benefit of the said V. W. and her children foresaid : AND my said trustees SHALL MAKE PAYMENT of the capital or fee of the said sum, or the portion thereof which may be remaining, to the children of the said V. W., in such proportions, at such terms, and subject to such conditions (including a power to restrict the interests of any of the children in their shares to a liferent alimentary interest, and to destine the fee to their issue), as the said V. W. may appoint by any writing under her hand, and failing such appointment, then to the children of the said V. W. surviving at her death, jointly with the then surviving issue, if any, of such of the said children as may die leaving issue, equally among them *per stirpes* ; and failing all the children of the said V. W., then to the surviving issue of those who may die leaving issue who survive her, equally among them *per stirpes*, PAYABLE, in the case of sons, on their respectively attaining the years of majority ; and in the case of daughters, on their respectively attaining to the years of majority or being married, whichever of these events shall first happen ; and the annual interest of the shares prospectively falling to any of my said legatees who may not have attained to majority at the death of the said V. W. shall be paid to their legal guardians for their behoof ; and failing issue of the said V. W. who survive her, this legacy, or such part thereof as may be remaining, shall revert to and form part of my residuary estate ; DECLARING that my said trustees shall be entitled, during the lifetime of the said V. W., with her consent, to make payment to any of her children of such part of the fee of the said sum as they may think proper, to account of the share to which each child may be prospectively entitled : IN THE SIXTH PLACE, I direct my said trustees to convey to G. B., my eldest son, and the heirs of his body, my property called Y., in shire, such conveyance to be executed in favour of my son and his family as soon as he shall attain the years of majority ; and failing my said son and the heirs of his body before the period when he or they would be entitled to demand a conveyance as aforesaid, the said property shall form part of my

STYLE NO. IV.	residuary estate: AND, IN THE LAST PLACE, my said trustees and their foresaids shall [<i>insert here a positive direction to sell and convert the estate into cash, if this is thought expedient</i>] HOLD, APPLY, PAY and CONVEY the whole rest, residue and remainder of my means and estate, and the interest and other annual produce thereof, including the principal sum or sums which may be set apart to meet the annuities hereinbefore provided, when and as the same or any part thereof may be set free by the death or second marriage of the said M. N. or B., or by the death of the said Mrs E. B., to and for behoof of the lawful child or children of me, the said A. B., and the issue of such of them as may predecease the term of payment thereof, payable in such proportions, at such terms, on such conditions, and under such restrictions, as I may direct by any writing under my hand; AND FAILING any such writing, then to and for behoof of, and equally among, all my lawful children, payable to them, in the case of sons, on their respectively attaining to the years of majority; in the case of daughters, on their attaining to the years of majority or being married, whichever of these events shall first happen: AND IN THE EVENT of any of my said children dying before the said period of payment, leaving lawful issue, such issue shall be entitled, equally among them, to the share to which their parent would have been entitled if in life; and in the event of any of my said children dying before the said period of payment, without leaving lawful issue, the share of such deceiver, so far as unpaid or not conveyed, shall fall to and be divided equally among the survivors and survivor of my said children, jointly with the lawful issue of any of them who may have deceased leaving issue, such issue succeeding equally among them to the share to which their parent would have been entitled if in life; and the share falling to the minor representatives of any of my children who may predecease shall be paid over to their lawful guardians for their behoof: AND I DIRECT my trustees and executors to hold and apply the rents, interest, and other produce and income of my means and estate, after providing for the payment of the annuities hereinbefore provided, prospectively falling to each of my children, or such part thereof as my said trustees may deem necessary and proper for the maintenance, clothing, education, upbringing, and advantage of the said children respectively until actual payment of their shares: AND I provide that the sum to be so allotted for the maintenance, clothing, education, and upbringing of my said children may include a suitable board for them, to be paid to my said wife while they live in family with her: AND TO PREVENT DOUBTS, it is declared that the shares of succession effecting to my said children shall be
<i>Residuary destination. Residue to be divided among testator's children.</i>	
<i>Failing division, residue to be payable at majority or marriage.</i>	
<i>Institution of issue jointly with surviving children.</i>	
<i>Income of trust-estate appropriated to maintenance of family.</i>	
<i>Extent of beneficiary's right and restrictions thereon.</i>	
<i>Interest to vest on payment.</i>	

come vested interests in their persons at and only upon the arrival of the period of payment above mentioned: AND NOTWITHSTANDING the period for the payment of the shares of residue before expressed, I provide that it shall be lawful to and in the power and option of my trustees, if they see cause and deem it fit, to postpone the payment of the provisions aforesaid in the case of all or any of my children beyond the said term of payment, and to apply the interest or other annual produce of the same, during such interval, to and for behoof of such child or children, or by a deed under their hands to retain the said provisions or any of them vested in their own persons; OR TO VEST the same in the persons of other trustees, whom they are hereby authorised to appoint, with all or any of the powers, privileges, and exemptions conferred on themselves, so that my children or any of them, as the case may be, may draw and receive only the interest or other annual proceeds of their respective provisions during their lives, or for such time as my said trustees may fix; and that the capital may be settled on or for behoof of such child or children, and their lawful issue, on such conditions, and under such restrictions and limitations, and for such uses, as my trustees may in their discretion deem most expedient, of which expediency, and the time and manner of exercising the powers and option hereby given, they shall be the sole and final judges: AND ALSO, that it shall be lawful to and in the power and option of my trustees, if they shall so think fit, to advance and pay before the arrival of the term of payment foresaid, to and for behoof of my children or any of them, any part, not exceeding one-half of the fee or capital of the provisions hereby made in his or her favour, for establishing a son in business, or fitting out a daughter on marriage, or otherwise for the behoof of my children: AND I PROVIDE and DECLARE that all sums advanced or which may be advanced by me in loan to my said children or any of them, [which may be debited to them in my books or in any memorandum or writing left by me, or] for which vouchers may be held by me at my death, and all sums which may be chargeable and charged against my estate in respect of any obligations which I have come under, or may come under, for any of my said children, shall be debts due to my estate, and deducted from the provisions hereby made in their favour, or of those succeeding to them respectively; but no interest which may be due up to the date of my decease upon any such advances shall be charged against my said children or their foresaids: DECLARING that the whole provisions hereby made, in so far as in favour of or descending upon females, shall be expressly exclusive of the *jus mariti* and right of administration of any husbands they

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Trustees to have power to postpone payment,

and to vest children's provisions in trustees for behoof of their issue in fee;

and to anticipate payment of one-half of each child's provision.

Advances by testator to be charged against children's provisions.

Exclusion of *jus mariti*.

STYLE NO. IV.	<p>have married or may marry, and shall not be affectable by the debts or deeds of such husbands, or any diligence or execution competent to follow thereon; AND I PROVIDE and DECLARE that the acceptance of the foresaid provisions in favour of my said children shall be deemed and taken to be in satisfaction to them of legitim and executry, and of all claims legally competent to them upon my decease: AND I PROVIDE that my said trustees and executors shall be entitled to the fullest powers and exemptions usually conferred in similar cases according to the most liberal interpretation; and particularly, I AUTHORISE and EMPOWER them to submit to arbitration, or settle by the advice of counsel, all disputed claims competent to or against the said trust subjects and estate, or among the parties interested therein; TO COMPOUND and take part for the whole of any disputed debts or claims; TO LEND out the whole or any part of the trust-funds and estate on heritable security, or the debentures of incorporated companies, or on the security of the government funds, or of shares in chartered or incorporated companies in Great Britain; or to invest the same in the government funds, or in the purchase of heritable property, feu-duties, ground-annuals, or other heritages, or of the guaranteed or preference or debenture stock of railway or other incorporated companies in which the liability of each shareholder is limited to the value of the stock held by himself, or to retain the same in bank in Great Britain; and from time to time to alter and renew the securities as may be necessary, or may seem to them expedient; TO SECURE the annuities hereinbefore provided by purchasing liferent annuities from an insurance company, or from any other party or parties, and upon such security as they may think expedient; TO SETTLE and pay out the amount of the shares of the various beneficiaries entitled to the fee of the residue as they become payable, either by conveying a portion or portions of my said means and estate to them, or by paying their shares in money, or partly in the one way and partly in the other way, as to my said trustees shall seem fit, and upon such valuation or estimate of the amount and value of my means and estate or any part or parts thereof as to my said trustees shall seem right, whether made by themselves or by others: TO APPOINT any one or more of their own number, or any other proper person or persons, to be factor or factors, or law agent or law agents, under them for the management of the trust-estate, and to allow such factors suitable remuneration for their trouble, and such law agents the usual professional fees; but for the intrusions of such factors they shall not be liable, provided the party or parties so appointed were reputed solvent at the time [and had</p>
Provisions to be in satisfaction of legitim.	
Powers of administration defined and enlarged.	
Arbitration.	
Power to compound.	
Investment.	
Power to pay out residuary legatees' shares on a valuation of the estate, or by conveying a part thereof.	
Appointment of factors and agents.	

given security ; but for the sufficiency of which security they shall nor be liable further than that it was reputed sufficient at the time]:

STYLE NO. IV.

AND I PROVIDE and DECLARE that the said trustees shall not be liable for the sufficiency of the securities on which they may lend out the trust-funds, or of the banks in which the same may be deposited, but only that they were reputed sufficient at the time ; nor shall they be responsible that the properties, feu-duties, ground-annuals, stock, and others which they may purchase with the trust-funds, in terms of the powers hereby conferred, or any part thereof, shall realise the price or prices at which the same were purchased.

Indemnity clauses.

Indemnity for investments ;

[*If it is wished to indemnify the trustees against the consequences of constructive intromissions, add :—*AND I DECLARE that each of the said trustees shall be liable to account only for the funds actually received by himself, and not for any funds which he may have authorised a co-trustee, factor, or agent to receive ; and that any trustee who shall pay over to a co-trustee, factor, or agent, or shall do or concur in any act enabling such co-trustee, factor, or agent, to receive any monies for the general purposes of the trust, or for any definite purpose authorised by this settlement, shall not be responsible for any loss resulting from his failure to see to the due application of the fund intrusted to such co-trustee, factor, or agent.]

for constructive intromission ;

[*If it is wished to give immunity for omissions, add :—*AND NONE of my trustees shall be RESPONSIBLE for the failure to recover any debt or fund, the realisation of which has been by him intrusted to and undertaken by a co-trustee, factor, or agent to the trust.] And in order to prevent the failure of the discretionary powers hereby conferred in consequence of the office of trustee lapsing, I request my trustees, as soon as their number is, by resignation or otherwise, reduced below three, to assume other trustees with the same powers as are hereby conferred on themselves: AND I RESERVE my own life-rent use and enjoyment of the whole premises, and full power and liberty at any time during my life, and even on deathbed, to revoke, burden, qualify, explain, or in any way to alter, these presents at pleasure ; DISPENSING with the delivery hereof, and DECLARING that the same, so far as unaltered, though found lying by me or in the custody of any person undelivered at my decease, shall have the full effect of a delivered deed, any law or custom to the contrary notwithstanding: AND I CONSENT to the registration hereof for preservation.—IN WITNESS WHEREOF, etc.

for omissions and negligence.

Reservation of life-rent.

Delivery.

STYLE NO. V.

No. V.—*Abridged Form of Settlement of whole Estate in trust for Testator's Daughter or Widow in Alimentary Liferent, with power of Disposal as to part.—Fee to her Family; vesting at majority or marriage, and after expiry of liferent.—Power to Children to apportion shares prospectively falling to their Families.—Powers of advancement and anticipation.—Destination over to Appointees or Heirs of Liferentrix.*

Disposition to trustees.

Appointment of executors.

Declaration of trust,

and authority to realise and sell.

Trustees empowered to grant valid discharges.

Purposes of trust.
1. Payment of debts and expenses.

I, A. B. of X., with the view of settling my affairs, and providing for the disposal of my means and estate after my decease, and for other good causes and considerations, DO hereby GIVE, GRANT, DISPONE, ASSIGN, CONVEY and MAKE OVER to and in favour of C. D., E. F., and G. H., and to their legal successors in office [*it is now settled that a trust descends to acceptors and survivors, and the provision of a quorum and power of assumption are conferred by Statute; but if wished, the form of destination in No. IV. may be used*], and to the heirs of the longest liver of them, as trustees and trustee for the ends, uses and purposes after mentioned, and to the assignees of the said trustees, or their foresaids, all my estate, heritable and moveable, real and personal, owing and belonging to me at my decease, with the rents, interest, profits, and produce, and writs, titles, and vouchers thereof: AND further, I NOMINATE and APPOINT the said trustees and their foresaids to be my sole executors and executor: BUT THESE PRESENTS are granted and are to be accepted by my said trustees and their foresaids in trust, with the powers and privileges, and for the ends, uses, and purposes following, viz.: THAT THEY MAY, as they are hereby authorised and empowered to do, call, sue for, uplift, receive, assign and discharge the whole debts and effects due and belonging to me, and sell, realise and convert into money the whole of my estates and effects, and sell and dispose of my heritable estate, by public roup or private bargain, and for such price or other consideration as they might think fit; but the time, and manner, and propriety of selling my heritable property shall be entirely at the discretion of my said trustees: DECLARING that the debtors to my estate, or the purchasers thereof, or other parties with whom my trustees shall transact, shall have no concern or right to interfere with the application of the sums paid to my said trustees, whose receipts shall be sufficient exoneration for the same: AND my said trustees shall apply, as they are hereby AUTHORISED, DIRECTED and EMPOWERED to apply, my said estates and the produce thereof in manner following, viz.: IN THE FIRST PLACE, in payment of all my just and lawful debts, sickbed

and funeral charges, and also of the expenses of this trust, which debts, expenses, and others, my said trustees may pay without requiring legal constitution: **IN THE SECOND PLACE**, my said trustees and executors shall pay over to E. B. or D., my daughter [*some of the clauses of this form are peculiarly adapted to the case of a life-rent destination to the testator's widow*], the whole annual produce and rents of the residue and remainder of my means and estate during all the days and years of her life: **DECLARING** that it shall be lawful to and in the power of my said trustees and executors to pay to the said E. B. or D., from time to time as they may think fit, such portions or the whole of the principal of my said means and estate as they may think fit; **WHICH PROVISIONS** above made in her favour shall be held and applied as an alimentary provision for behoof of herself and any child or children she may have, as long as such child or children continue to reside in family with her, and shall not be affectable by her debts or deeds, or attachable by the diligence of her creditors: **AND I GRANT** power to the said E. B. or D. to test upon and dispose of the principal sum of £1000 sterling, part of the said residue, or any part of the said principal sum of £1000, by any *mortis causa* deed to be executed by her, and to take effect after her death, and that to and in favour of such persons or person as she may appoint, to whom my said trustees are authorised to make payment accordingly; and failing such disposal, the said sum shall be applied as is herein directed with respect to my residuary estate: **IN THE THIRD PLACE**, I direct my said trustees and their foresaids, on the death of the said E. B. or D., to hold and apply, pay, divide and convey the whole rest, residue and remainder of my means and estate, heritable and moveable, real and personal, and the produce thereof which may be then remaining, excepting such part thereof as the said E. B. or D. may dispose of in virtue of the foresaid power, to and for behoof of the lawful child or children of the said E. B. or D., payable in such proportions, at such terms, on such conditions, and under such restrictions, as she may direct by any writing under her hand; and failing any such writing, then to the surviving children of the said E. B. or D. equally, the issue of any predeceasing child being entitled to the interest which the parent would have taken as a surviving legatee, payable to them, in the case of sons, on their respectively attaining to the years of majority; or in the case of daughters, on their respectively attaining to the years of majority or being married, whichever of these events shall first happen: **AND I DECLARE** that the interests of my legatees shall vest in them at and only upon the death of the said E. B. or D.: **BUT** any of the children of my said daughter, upon

STYLE NO. V.

2. Liferent of whole estate to testator's daughter.

Trustees authorised to make advances from the capital.

Liferent declared alimentary.

Power of disposal of part of fee granted to liferenter.

8. Fee settled upon liferenter's children and their issue.

Power of division granted to liferenter.

Fee to vest on expiry of life-rent.

STYLE NO. V.

Power of divi-
sion granted
to prospective
heirs.

Application of
income during
minorities.

Power to anti-
cipate pay-
ment.

4 Destination
over to ap-
pointees of
liferentia :

and in default
of appoint-
ment, to her
heirs.

attaining to majority, and during the lifetime of their mother, shall have power to divide and apportion his or her prospective interest, or the interest of his or her family, among his or her children and their issue, in such proportions and subject to such conditions as he or she may think proper :—[*The vesting clause may be varied so as to make the interest vest at majority or marriage notwithstanding the subsistence of the liferent right ; in which case the power of division will of course be omitted, or so as to make both the occurrence of majority or marriage and the expiry of the liferent conditions precedent to the vesting.*]—AND I DIRECT my said trustees to hold and apply the rents, interest, and other produce and income of my means and estate prospectively falling to each of the said children of the said E. B. or D., or such part thereof as my said trustees may deem necessary and proper for the maintenance, clothing, education, upbringing, and advantage of the said children respectively, until actual payment of their shares : AND NOTWITHSTANDING the period for the payment of the shares of residue before expressed, I provide that it shall be lawful to and in the power and option of my trustees, if they shall so think fit, to advance and pay, before the arrival of the term of payment foresaid, to and for behoof of the said children of the said E. B. or D., or any of them, the whole or any part of the fee or capital of the provisions hereby made in their favour, for their support, or for establishing a son in business, or fitting out a daughter on marriage, or otherwise for behoof of the said children : AND IN THE LAST PLACE, in the event of the failure of lawful children of the said E. B. or D., and of their issue, I direct my said trustees, on her death, or on such failure, whichever shall last happen, to hold and apply, pay, divide and convey the whole rest, residue and remainder of my said means and estate, heritable and moveable, real and personal, and the produce thereof, or the portion thereof then remaining, to and for behoof of such person or persons, payable in such proportions, at such terms, and on such conditions, and under such restrictions, as the said E. B. or D. may appoint by any writing under her hand ; AND FAILING any such writing, then to and for behoof of her nearest lawful heirs whomsoever : AND I PROVIDE [*as in Style No. IV.*].

STYLE NO. VI.

No. VI.—*Settlement of a Merchant or Manufacturer, empowering Trustees to carry on Testator's business.—Eldest Son, and afterwards second Son, to have the powers of Managing Partners, and to receive share of profits.—Residuary interest to vest*

in whole Family after the youngest Child attains majority.— STYLE NO. VI.
Provisions as to ultimate transfer of business to Sons at a valuation, in the Trustees' discretion.

I, A. B. of X., being desirous to settle during my life the succession to my subjects and estate, do hereby GIVE, GRANT, ASSIGN and DISPONE to and in favour of Disposition to trustees.

and to such other person or persons as may be hereafter nominated and appointed by me, or as may be lawfully assumed into the trust, and to the acceptors and survivors and the acceptor and survivor of them, and the heirs of the longest liver of them, as trustees and trustee, for the ends, uses and purposes after mentioned, DECLARING the major number of them surviving and accepting the office of trustee from time to time (although not accepting that of executor), and resident in Great Britain to be a quorum, All and Sundry lands, tenements, tacks, heritages, and also All and Sundry goods, debts, effects, sums of money, and stock-in-trade, and in general the whole means and estate, heritable and moveable, real and personal, owing and belonging, or that shall be owing and belonging to me at my death, or of which I may have the power of disposal, with the whole rents, interest, and produce, and writings, vouchers, and securities thereof: AND I hereby NOMINATE and APPOINT the said Appointment of executors. and any other person or persons who may be nominated and appointed, or may be assumed as aforesaid, and the acceptors and survivors and acceptor and survivor of them and their foresaids, to be my sole executors and executor, and universal intromitters and intromitter with my whole moveable or personal estate, with power to give up inventories thereof, confirm the same if needful, and in general to do everything else which to the office of executor belongs: DECLARING that these presents are granted, and the said Declaration of trust, and purposes. subjects, heritable and moveable, are disposed and conveyed to the said trustees in trust, for the ends, uses, and purposes, and with the powers after-mentioned, viz.: IN THE FIRST PLACE, my said trustees and executors shall make payment of my whole just and lawful debts, 1. Payment of debts and expenses. of my sickbed and funeral charges, and of the expenses of the trust and executorship hereby committed to them: IN THE SECOND PLACE, 2. Legacy of furniture, etc., to testator's widow. the said trustees and their foresaids shall transfer and deliver to C. D. or B., my spouse, the whole household furniture and plenishing, beds, table linen, books, paintings, engravings, wines, and other liquors, and generally the whole household plenishing and effects 3. Trustees to permit business to be carried on by testator's sons, that may belong to me at my decease: IN THE THIRD PLACE, as it is my wish that my business of a brewer, presently carried on by me

STYLE NO. VI.

who shall
account to the
trustees.

Salary and share
of profits pay-
able to testator's
sons.

Net profits to be
paid over to the
trustees for
certain subsi-
diary purposes.

1. For pay-
ment of an-
nuity to tes-
tator's widow.

in Y. Street, upon the heritable subjects there belonging to me, shall be preserved and carried on for behoof of my family, I hereby request and authorise my said trustees and executors to allow the same to be carried on for such length of time as they may consider advisable, under the management of my eldest son, so long as he shall conduct the said business to the satisfaction of my said trustees and executors; and if and when my second son shall attain the age of twenty years, I request and direct that he shall be conjoined with his elder brother in the management of the said business, if my said trustees shall think such a step proper; and the business shall thereafter be carried on by my said sons, and the survivor of them; **DECLARING** that so long as the said business shall be so carried on by my said son or sons, or the survivor of them, the same shall be carried on under the firm of A. B. & Co., and my said son or sons, or the survivor of them, shall be entitled to sign, on behalf of the said firm, all documents and writings necessary for the proper conducting of the business, and my said son or sons shall keep regular and distinct books, showing the whole transactions of the business, which shall at all times be open and patent to the said trustees, and the said books shall be brought to a balance upon the 31st day of January annually, and a copy of the balance sheet furnished to the said trustees without delay; declaring that so long as the said business is carried on upon the said premises, the same shall be debited and charged with such rent therefor as my said trustees may from time to time consider fair and adequate: **AND FURTHER DECLARING**, that so long as the said business is so carried on, my eldest son shall be entitled to a salary of £ per annum, payable quarterly, and also to one-fourth part of the net annual profits of the business, after deducting rent as aforesaid and interest on the capital forming part of my trust-estate embarked in the business, as the same may appear from the balances to be made as aforesaid, in remuneration for his time and trouble in managing said business; and if and after my second son is conjoined in the management of the business, he shall also receive one-fourth part of the net annual profits of the business, as the same may appear as aforesaid: **AND FURTHER DECLARING** that the remainder of the profits of the said business shall be under the control and management of and paid over to the said trustees, who shall apply the same, and the annual proceeds of the residue and remainder of my means and estate, as follows, viz.: **FIRST**, they shall make payment to the said Mrs C. D. or B. of an annuity, additional to the annuity secured to her by our contract of marriage, of £ sterling yearly, free from all deductions, duties, and taxes, at two terms in the year,

Whitsunday and Martinmas, by equal portions, beginning the first term's payment at the first of these terms that shall occur after my decease for the half-year succeeding, with interest, at the rate of five pounds per centum per annum, from the terms at which the same respectively become due until paid; and which annuity to my said spouse shall be payable, and I accordingly direct my said trustees to make payment of the same, to her out of the fee of my said estate, if the annual income and produce thereof shall not be sufficient for that purpose: **SECOND**, they shall from the said annual profits and the said annual proceeds pay or apply the sum of £ sterling annually, or such other sum as my said trustees may consider adequate and proper in the circumstances of my family, to or for behoof of each of my children who may be in minority at my decease until they shall respectively attain the age of 21 years complete, for their maintenance, education, and upbringing; and which annual payments may, in the discretion of the said trustees, be paid to the said Mrs C. D. or B. for behoof of the said children: **THIRD**, they shall from the said annual profits and the said annual proceeds make payment of an annuity of £ to E. B., my sister, yearly, free from all duties, deductions, and taxes, payable at the terms, and commencing to be payable at the term, before provided in regard to the annuity in favour of my said spouse; and which annuity, like that in favour of my said spouse, shall be payable out of the fee of my estate should the annual income and produce thereof not be sufficient for that purpose: **AND FOURTH**, so much of the balance of the said net annual profits and of the said annual proceeds as may by my said trustees be considered advisable, shall, if my said trustees in their sole discretion think proper, from year to year be added to the capital of the said business, and employed in extending the same; **DECLARING** that at the 31st day of January succeeding the attainment of majority by all my surviving children, or their marriage if daughters, the said trustees may allow my said eldest son and second son, or the survivor of them, to acquire the said business, and the whole stock-in-trade and assets effecting thereto, and debts due to the same, and also the heritable subjects belonging to me in which the said business is carried on, if the same shall then be carried on in the same premises, at such price as may be mutually agreed upon between my said trustees, on the one hand, and my said sons or the survivor of them on the other, which failing, at such price as may be put thereon by two arbiters, one whereof shall be named by my said trustees and their foresaids, and the other by my said sons or the survivor of them, with power to the said arbiters to name an oversman in the event of their dif-

STYLE NO. VI.

2. Provision for the maintenance of testator's children.

3. Annuity to testator's sister.

4. Surplus may be employed in extending the business.

Provision for sale of business to testator's two elder sons, on arrival of youngest child at majority, etc.

STYLE NO. VI.

Younger children may be permitted to retain an interest in the concern.

Business may be wound up.

Trustees may anticipate the term appointed for selling or winding up the business ;

in which case, annuities to be charged on general estate, and maintenance of children on their respective provisions.

Residuary destination to surviving children and their issue on youngest child attaining majority.

fering in opinion.—*[If it is wished that other members of the family should be interested in the business, the following provision may be made:]* PROVIDED ALWAYS that if any of my other children prefer to retain his or her interest in the said business, they shall be at liberty to do so, but shall not be bound to assist in the management of the business ; and my trustees shall in that event assign and specifically convey to such child such share of the said business as he or she may be entitled to in virtue of the final purpose of this my settlement ; reserving to my said two sons, and the survivor of them, the same fixed salary, and the same share of profits in remuneration for their management of the business, as is hereinbefore provided to them, for which sums and shares they or he shall accordingly be entitled to take credit in accounting with such of my other children as may choose to retain their interest in the business.]—DECLARING that, in the event of both of my said sons deceasing before the period above mentioned, the said business shall, upon the death of the survivor, be disposed of and wound up : BUT PROVIDING always and DECLARING, that it shall be in the power of my said trustees and their foresaids, if they shall think it expedient and judicious, of which they shall be the sole and exclusive judges, either to sell the said business to my said sons or the survivor of them at an earlier period than is before provided, or they may have the said business wound up and brought to an end, the stock, assets, and good-will disposed of, and the debts and liabilities paid, at any time (even before the expiry of the foresaid period) which they may think proper ; AND IN THE EVENT of the said trustees exercising the said power, or of the said business being wound up before the period before mentioned, the foresaid annuities to my said wife and sister, and the foresaid annual payments to each of my said children, shall be paid as follows : The said annuities out of my general estate, and the said annual payments from the annual income and produce of the shares of my estate hereinafter provided in favour of my children respectively : AND IN THE LAST PLACE, after all my surviving sons shall have attained the age of majority, and my surviving daughters shall either have attained the age of majority or have been married, my said trustees and their foresaids shall pay or convey the whole residue and remainder of my means and estate, including the sums which may be paid by my said sons or realised by my said trustees in respect of the said business (or the property of the said business itself, in the event of any of my children electing to take a specific conveyance of their proportional share thereof), and the annual income and produce thereof, to and for behoof of my whole surviving children, and the issue of any children who may

have predeceased, in equal shares (the division being *per stirpes*); STYLE NO. VI.
 IT BEING MY INTENTION that the shares of the residue and remainder
 of my estate, divisible as aforesaid, shall become vested interests in Interests of
 testator's child-
 ren to vest at
 the period of
 distribution.
 the persons of any of my children, or of the issue of any of my
 children, at and only upon the period of distribution above specified.
*[Insert declaratory powers and formal clauses as in Style No. IV.,
 including such of the special powers embodied in the introductory
 purpose of that style as may be deemed requisite.]—IN WITNESS*
 WHEREOF, etc.

No. VII.—*Settlement of a landed Proprietor having interests in* STYLE NO. VII.
Mines, etc.—Destination of Heritable Estate to Eldest Son
and his Heirs, under reservation of minerals for twenty-one
years.—Portions of that Estate, and certain manufacturing
subjects, to Second Son.—Power of Division under Marriage-
Contract exercised.—Produce of minerals during twenty-one
years to be added to residuary fund; division in unequal pro-
portions amongst Sons and Daughters and their Issue.—In-
terests to vest a morte testatoris.

I, A. B., Esquire of X., with the view of settling my affairs
 after my decease, and for other good causes and considerations me
 hereto moving, DO hereby GIVE, GRANT, ASSIGN, DISPONE, CONVEY, and Conveyance to
 trustees.
 MAKE OVER to and in favour of

, and any other person or persons
 who may be hereafter nominated by me, or lawfully assumed into
 the trust, and the acceptors and survivors and acceptor and sur-
 vivor of them, the major number of them accepting and surviving,
 and resident in Great Britain, from time to time being a quorum,
 and to the heirs of the longest liver of them, as trustees and trustee
 for the ends, uses, and purposes after mentioned, and to the onerous
 assignees of the said trustees and their foresaids, All and Sundry
 lands, tenements, heritages, goods, gear, debts, effects, and sums of
 money, and in general the whole means and estate, heritable and
 moveable, which shall be owing and belonging to me at my decease,
 with the rents, interest, and produce, and the writings, titles, and
 vouchers of the premises: AND further, I do hereby NOMINATE and Appointment of
 executors.
 APPOINT the said trustees and their foresaids to be my only execu-
 tors and executor, and universal intromitters and intromitter with
 my personal means and estate, with full power to give up inven-
 tories thereof, and confirm the same at pleasure, and generally to
 do everything pertaining to the office of executor: BUT THESE PRE-

STYLE NO. VII.	SENTS are granted and are to be accepted by my said trustees and
Declaration of trust, and grant of special powers.	their foresaids in trust for the ends, uses, and purposes, and with the powers and privileges, following, viz.:—THAT THEY MAY, as they are hereby authorised and empowered to do, call, sue for,
Power to realize; power of sale.	realise, uplift, receive, assign and discharge the whole means and estate which may belong to me at my decease; WITH POWER to sell and dispose of my heritable estate, except in so far as the same may be disposed and conveyed in favour of my children in pursuance of the provisions hereinafter made in their favour respectively, and that by public roup or private bargain, and to grant, execute and deliver all deeds and writings necessary for carrying into effect the purposes of the trust, binding my estate in absolute war-
Trustees empowered to grant valid discharges.	randice: AND I PROVIDE and DECLARE that all parties dealing and transacting with my said trustees shall have no concern with, or right to inquire into, the application and management of my means and estate, but that the receipt of my said trustees shall be sufficient exoneration: AND I further PROVIDE and DECLARE that any
Trustees and beneficiaries empowered to become purchasers of the trust-estate.	one or more of my trustees, or the beneficiaries under these presents, shall be entitled to become purchasers of my estate or any part thereof, any law or custom to the contrary notwithstanding:
Purposes of the trust.	AND my said trustees shall HOLD and APPLY my means and estate, and the proceeds and produce thereof, as follows, viz.:—IN THE
1. Payment of debts and expenses.	FIRST PLACE, in payment of all my just and lawful debts, sickbed and funeral charges, and of the expenses of executing this trust, which debts, charges and expenses my said trustees may pay without requiring legal constitution: IN THE SECOND PLACE, in pay-
2. Annuity to testator's sister.	ment of a free liferent annuity of £ sterling to C. D., my sister, free of legacy-duty, during all the days and years of her life after my decease, payable at such periods as she may require the same.—[<i>In this form the testator is supposed to be a widower. In other cases an annuity additional to her jointure may be given to</i>
3. Division of plate and household effects amongst testator's children.	<i>the testator's widow, and also a provision of furniture, etc.</i>]—IN THE THIRD PLACE, my said trustees shall deliver over to my children, in as nearly equal shares as practicable, and in such way and manner as they may agree upon among themselves, according to their own taste and judgment, which failing, as my said trustees may deem best and most fitting, my whole plate, paintings, books, napery, household furniture and effects, so far as not hereinafter bequeathed to my son E. B., or the party succeeding to him under the fifth purpose hereof; and in the event of any of my children predeceasing me, their children shall succeed equally among them to their parents' share: IN THE FOURTH PLACE, in payment to each
4. Legacy to each of testator's daughters.	of my daughters, J. B., and Mrs M. B. or N., of a legacy of £

sterling, in addition to the provisions hereinafter made in their favour, payable at the first term of Whitsunday or Martinmas occurring six months after my decease, with interest at the rate of five pounds per centum per annum from that term until paid ; and in the event of either of my said daughters predeceasing me, leaving children, such children, and the survivors or survivor of them, shall be entitled equally among them to the legacy provided to their parent, the issue of any of the children of my said daughters who may have deceased leaving issue being entitled to the share to which their parent would have been entitled if in life ; and also, in payment of such other legacies or donations as I may bequeath by any signed codicil or informal writing under my hand expressive of my intention : IN THE FIFTH PLACE, my said trustees shall, as soon as convenient after my decease, dispoſe, convey, and make over to my eldest son, E. B., those portions of my lands and estate of Southfield and others, marked on the plan indorsed hereon, and signed by me as relative hereto, by the following numbers, viz., one, two, three, four, and five, and coloured green upon the said plan, being the whole of my lands and estate of Southfield and others, except those portions thereof hereinafter especially directed to be conveyed to the parties after named, with the parts, pendicles, privileges, and pertinents thereof, and whole rights pertaining thereto, and whole buildings and erections thereon ; UNDER BURDEN of the feu-rights of such portions thereof as may have been feued out and disposed by me, in so far as the same have not been or may not be re-acquired by me, with the rents and feu-duties falling due in respect thereof, from the first term of Whitsunday or Martinmas after my decease ; and also the whole fixtures, window-curtains, grates, blinds, and other articles of standing furniture fitted for and in use in the mansion-house of Southfield at my death, and which my said trustees shall have power to settle and point out in case of dispute : AND IN THE EVENT of the said E. B. predeceasing me, then the said trustees and their foresaids shall dispoſe, convey and make over the said lands and others, under the reservation before referred to, with the pertinents, rights, and others, and rents as aforesaid, to the nearest heir-male of the body of the said E. B., and failing heirs-male of his body, the said lands shall form part of my residuary estate ; SUBJECT, the said eventual disposition in favour of the heir-male of the said E. B., to the payment, and with and under the real lien and burden, of the sum of £10,000 sterling, which shall be payable by such heir-male to my said trustees and their foresaids at the first term of Whitsunday or Martinmas occurring six months after my decease, with interest thereon at the rate of five pounds per

STYLE NO VII.

5. Specific destination of heritable estate to the testator's eldest son ;

under burden of feu-rights ;

and also certain fixtures and furniture.

Conditional institution of heirs-male of the body of the beneficiary.

Beneficiary's heir-male burdened with payment of a provision to younger children.

STYLE NO. VII. centum per annum from that term until paid; **WHICH SUM** of £10,000 shall be held and applied by the said trustees and their foresaids for behoof of the issue of the said E. B. surviving me, other than the heir succeeding to the said estates, equally among them *per stirpes*, payable to sons upon their respectively attaining to majority, and to daughters upon their respectively attaining to majority or being married, whichever of these events shall first happen; and the annual income and interest of the share prospectively falling to each child or descendant of the said E. B. shall be paid to his or her legal guardian for the purpose of being applied towards his or her maintenance, education and upbringing, until the foresaid period of payment: **IN THE SIXTH PLACE**, my said trustees shall, as soon as convenient after my death, dispoⁿe, convey and make over to my son, G. H. B., those portions of my lands marked on the said plan by the following numbers, viz., six, seven, and eight, and coloured blue on the said plan, but under the same reservations expressed in relation to the lands appropriated under the fifth purpose hereof, and also the whole heritable subjects belonging to me situated at St David's, in the parish of _____, together with the whole parts, pendicles, and pertinents thereof, and whole rights pertaining thereto, **AND** the whole buildings, erections, and machinery, heritable and moveable, thereon, and the rents to become due in respect thereof, from and after the first term of Whitsunday or Martinmas after my decease: **AND** I do hereby **PROVIDE** and **DECLARE**, that in the event of the said G. H. B. predeceasing me, leaving issue surviving me, my said trustees may either dispoⁿe and convey the lands and others before provided in his favour to and equally among his lawful children who may be alive at my decease, and the issue of any of them who may have predeceased leaving children, such issue succeeding equally and proportionally to their parent's share, or they may retain the said lands and others for such period as they may judge proper, and apply the annual income and produce thereof to and for behoof of the parties in whom the said estates will by the terms of the foregoing destination vest at my decease, or their heirs and assignees; **AND MAY SELL** and dispose of the said lands and others, under the reservations before referred to in the fifth and sixth purposes hereof, in virtue of the powers before conferred, if and when they think proper, and divide the prices and proceeds thereof among the parties entitled thereto as aforesaid, and failing my said son, G. H. B., without leaving issue surviving me, then the portion of my lands and others destined to his family shall revert to and form part of my residuary estate: **IN THE SEVENTH PLACE**, I do hereby expressly **PROVIDE** and **DECLARE** that the disposi-

Destination of
younger children's
provision.

6. Specific des-
tination of cer-
tain parts of
the heritable
estate to second
son;

with buildings
and machinery,
etc.

Conditional
institution of
second son's
children and
their issue.

Discretionary
trust to sell for
behoof of his
family.

tions and conveyances of my lands of Southfield and others, exclusive of my subjects at St David's, to be granted in favour of my children and their foresaids in manner foresaid, shall be granted subject to the reservation in favour of my said trustees and their foresaids of the whole coal, metals, and minerals situated in and under my said lands of Southfield and others, and all the parts thereof, for the period of twenty-one years from and after the date of my decease; and the said trustees shall hold and possess the same for the said period, in terms, with the powers, and for the objects expressed in the last purpose hereof, hereinafter written; AND upon the expiry of the said period, I provide and declare that the said coals, metals, and minerals, so far as then unwrought, shall become and be the property of the party or parties under whose lands the same are situated, and my said trustees shall, if required, execute conveyances thereof to the parties respectively entitled thereto: AND IN RESPECT that certain portions of the foresaid lands of Southfield and others are burdened with an heritable debt for the sum of £ , I provide and declare that the said debt, or such part thereof as may be remaining unpaid at my decease, with the interest thereon, shall be wholly payable from those portions of my said lands destined to the said E. B. and his foresaids, and shall be created real liens and burdens thereon in the dispositions which may be executed thereof, so that the remainder of the said lands may be wholly freed and relieved of the same: AND I further PROVIDE and DECLARE that the foresaid subjects and others at St David's, directed to be conveyed to the said G. H. B. and his foresaids, shall be so conveyed under burden and subject to any heritable securities which may affect the same at my death: AND I DESIRE that my said trustees shall hold the whole coals, metals, and minerals situated in and under my said lands of Southfield and others for and during the foresaid period of twenty-one years from and after my decease; AND should the same not be let at the period of my decease, I request my said trustees to let the same as soon thereafter as may be practicable, and that for such fixed rent, lordship, or other consideration, and for such period, and generally on such terms, as they may in their discretion consider proper; And I declare and provide that, in letting the said coals, metals, and minerals, the said trustees shall have the most full and ample discretion as to the mode and terms upon which the same shall be wrought: AND PARTICULARLY, without prejudice to the said generality, I provide and declare that they shall have power to confer upon the tenants liberty to construct roads, sink pits, and erect engines, store and bin coals, calcine ironstone and burn lime, and

STYLE NO. VII.

7. (Exceptions from prior destination.)
Reservation of minerals for the term of 21 years.

After the lapse of 21 years, mineral property to accrete to the lands.

Heritable debts secured on principal estate to be payable therefrom.

Idem, as to estate destined to second son.

Trustees to accumulate produce of mineral estate;

with power to lease;

and to enter into collateral contracts with the tenants for working, etc.;

STYLE NO. VII.

and to bind the
tenants to ex-
haust certain
portions.

Provisions
against working
near houses, etc.

8. Execution of
power of divi-
sion reserved to
testator by mar-
riage-contract.

Residuary desti-
nation (including
produce of mine-
ral estate) to
testator's child-
ren in unequal
proportions.

generally to make all erections and perform every operation requisite or desirable in working, winning, and preparing the said coal, metals, and minerals, and that upon any part of the said lands belonging to me which may be found to be most convenient for all or any of the said purposes, the tenants being always taken bound to compensate the proprietor and tenant of the surface for whatever damage may be done to the surface of the said lands and the buildings thereon by their operations or erections made thereupon: AND I further provide and declare that the said trustees shall in their discretion be entitled, if they consider that a greater return may be derived from the said coals, metals, and minerals, to let those in certain portions of the said lands in preference to others, or to authorise or take the tenants bound to work the said coals, metals, and minerals under certain portions of the said lands in preference to others, my desire being that as large a sum as practicable shall be derived from the said coals, metals and minerals within the foresaid period: AND I RECOMMEND my said trustees, in letting the said coals, metals, and minerals, to see that proper stipulations are made with the tenants against working within a safe distance of houses and buildings; and I also recommend them to introduce clauses for prohibiting working under such portions of the said lands destined to my said sons as may be immediately available for feuing purposes: IN THE EIGHTH PLACE, whereas by the contract of marriage entered into between me and Mrs E. L. or B., my spouse, there is reserved to me a power of dividing and apportioning the fund thereby provided to the children of the marriage and their issue, in such manner, and subject to such conditions with respect to the term of payment and otherwise as I should direct, I hereby apportion and divide the said fund into six equal shares, and appoint the same to be paid and applied by the trustees of the said contract of marriage in the proportions, to the persons, in the manner, and at the times specified in the last purpose of this my settlement, it being my intention that the fund provided to the children of the marriage and their issue as aforesaid shall be dealt with as part of my residuary estate: AND IN THE LAST PLACE, I direct and appoint my said trustees to hold the whole residue and remainder of my means and estate, heritable and moveable, with the prices and produce thereof, and to convey or divide and pay over the same, and also to divide and apportion annually the rents, lordship, and income derived from the said coals, metals, and minerals, into six equal parts or shares, and to make payment of two of the said parts or shares to each of my said sons, and of one of the said parts or shares to each of my daughters, J. B., and Mrs M. B.

or N.: AND in the event of any of my said children predeceasing me leaving issue, such issue shall succeed, equally among them, to their parent's share; and in the event of the decease of any of them without leaving lawful issue, or in the event of such issue existing but predeceasing me, the share of such deceiver shall fall to and be divided equally among the survivors or the survivor of my said children, jointly with the lawful issue of any of them who may have deceased leaving issue, such issue being entitled equally among them *per stirpes* to the share to which their parent would have been entitled if in life: IT BEING MY INTENTION that the right, not only to the lands and estates specifically disposed, but also to the residue and remainder of my means and estate, including the prospective interest in the rents, lordships, and annual income of the said coals, metals, and minerals, shall vest at the date of my decease, at which period the conditional institution of survivors throughout this settlement shall take effect notwithstanding the postponement of payment to a later period. [*Insert declarations, powers, and other formal clauses, as in Style No. IV., or such of them as may be applicable.*]

STYLE NO. VII.

Conditional institution of issue. Equal division of lapsed shares among surviving children and issue of predeceasing children.

Interests in the testator's whole succession to vest at his decease.

No. VIII.—*Mutual Trust-Settlement by Spouses.—Destination of Furniture, etc., and also a liferent of the Residue to the surviving Spouse.—Fee of Husband's estate to the Family, with destination over to collateral Relatives.—Wife's estate, idem.—Abridged form of Declarations and Powers, etc.*

STYLE NO. VIII.

We, A. B. of X., and C. D. or B., spouses, with the view of settling the succession to our means and estates after our deaths respectively, and for our mutual love and affection, and other good causes and considerations [*Where the right of revocation is meant to be restricted, say:—*In consideration of the provisions herein contained, granted by each of us in favour of the other, and for other good and onerous causes], DO hereby GIVE, GRANT, ASSIGN, DISPONE, CONVEY, and MAKE OVER, from and after our respective deaths, to and in favour of

Disposition to trustees.

and to any other person or persons whom we may hereafter nominate and appoint by any joint writing under our hands, or who may be lawfully assumed into the trust, and the acceptors and survivors and acceptor and survivor of them, the major number of them accepting and surviving and resident in Great Britain from time to time being a quorum, and to the heirs of the longest liver of them,

STYLE NO. VIII.	as trustees and trustee for the ends, uses, and purposes after mentioned, and to the assignees of the said trustees, or their said quorum or their foresaids, All and Sundry lands, tenements, tacks, heritages, debts, goods, gear, effects, and sums of money, shares in trading or other companies, and in general the whole means and estate, heritable and moveable, real and personal, owing and belonging, or which shall be owing and belonging to us respectively at our respective deaths, or of which we or either of us may have the power of disposal, with the rents, interest, profits, and produce, and writings, titles, and vouchers thereof: AND FURTHER, we severally NOMINATE and APPOINT our said trustees and their foresaids to be our sole executors and executor respectively, with full power to give up inventories of our respective personal means and estate, and confirm the same at pleasure, and generally to do everything pertaining to the office of executor: BUT THESE PRESENTS are granted, and are to be accepted by our said trustees and their foresaids in trust, with the powers and privileges, and for the ends, uses, and purposes following, viz.:—THAT THEY MAY, as they are hereby authorised and empowered to do, call, sue for, uplift, receive, assign and discharge the whole debts and effects due and belonging to us respectively; WITH POWER to sell, realise, and convert into money the whole of our respective estates and effects, and particularly to sell and dispose of our respective heritable estates by public roup or private bargain, and for such price or other consideration as they may think fit; but the time and manner and propriety of selling our heritable property shall be entirely at the discretion of our said trustees; DECLARING that the debtors to our respective estates, or the purchasers thereof, or other parties with whom our trustees shall transact, shall have no concern or right to interfere with the application of the sums paid to our said trustees, whose receipts shall be sufficient exoneration for the same: AND our said trustees SHALL APPLY, as they are hereby authorised and empowered to apply, our said respective estates, and the produce thereof, in manner following, viz.:—IN THE FIRST PLACE, in payment of the just and lawful debts due by us respectively at our respective deaths, sickbed and funeral charges, and of the expenses of this trust, which debts, expenses, and others, our said trustees may pay without requiring legal constitution: IN THE SECOND PLACE, we direct our said trustees and executors to convey and deliver the whole plate and books, and household furniture and plenishing, bed and table linen, china, and whole other household effects which may belong to the first deceiver of us, to the survivor, as the absolute property of such survivor: IN THE THIRD PLACE, in payment to the survivor of us of
Appointment of executors.	
Declaration of trust, and grant of special powers.	
Power to realise.	
Power of sale.	
Trustees empowered to grant valid discharges.	
Purposes of the trust.	
1. Payment of debts and expenses.	
2. Provision of furniture, etc., to the survivor.	
3. Liferent of residue to the survivor.	

the whole annualrents, interest, and produce of the residue and remainder of the means and estate of the first deceiver of us; which different provision shall be held and applied by the survivor as an alimentary provision for the support and maintenance of the survivor, and the support, maintenance, and upbringing of the children of our marriage: IN THE FOURTH PLACE, upon the death of the survivor of us, the said trustees and their foresaids shall hold, apply, pay and convey the whole rest, residue, and remainder of the means and estate of me, the said A. B., to and for behoof of those of my children who shall survive the longest liver of myself and my said spouse, and shall also attain the age of majority, jointly with the issue of any predeceasing child who may be alive on the attainment of majority by my youngest surviving child (the division being *per stirpes*); which provisions shall be payable to the said children upon their respectively reaching majority, and to the said issue, or to their legal guardians, on the attainment of majority by my youngest surviving child: AND the interest and annual income of the share falling prospectively to each child shall be applied towards his or her maintenance and education until the period of payment above mentioned: IN THE FIFTH PLACE, in the event of the failure of issue of the body of me, the said A. B., the said trustees and their foresaids shall pay the whole annualrents, interest, and produce of the said residue and remainder of the means and estate of me, the said A. B., to E. B., my father, during all the days and years of his life; whom failing, to my mother, Mrs G. H. or B., during all the days and years of her life; and upon the death of my said father and mother, they shall pay and convey the capital and principal thereof equally to and among such of my sisters, J., L., and M., and my brother, N., as may be then alive, jointly with the lawful issue who may be then alive of such as may have predeceased leaving such issue (the division being *per stirpes*): IN THE SIXTH PLACE, upon the death of the survivor of us, the said trustees and their foresaids shall hold and apply the whole residue and remainder of the means and estate of me, the said C. D. or B., to and for behoof of those of my children who shall survive the longest liver of myself and my said spouse, and shall also attain the age of majority, jointly with the issue of any predeceasing child who may be alive on the attainment of majority by my youngest surviving child (the division being *per stirpes*); which provisions shall be payable to the said children upon their respectively attaining majority, and to the said issue, or to their legal guardians, on the attainment of majority by my youngest surviving child: AND the interest and annual income of the share falling prospec-

STYLE NO. VIII.

4. Destination of residue of husband's estate to his surviving children or issue; to vest on the arrival of the youngest child at majority.

Application of interest to the maintenance of the family.

5. Destination over to the husband's collateral relatives.

6. Destination of wife's estate to her surviving children or issue, under same limitations as the husband's.

STYLE NO. VIII.

Application of
the interest and
proceeds.

7. Destination
over to wife's
collateral rela-
tives.

Power to post-
pone payment;
to restrict bene-
ficiary's interest
to a life term;
or to create a
trust.

Exclusion of
marital rights.

Power to sub-
mit and refer;

to compound
and transact;
to invest on real
or personal se-
curity, etc.;

to change the
investments;
to appoint
factors, etc.;

tively to each child shall be applied towards his or her maintenance and education until the period of payment above mentioned: IN THE SEVENTH PLACE, in the event of the failure of the issue of the body of me, the said C. D. or B., the said trustees and their fore-saids shall pay and convey the capital and principal thereof equally to and among such of my brothers and sisters as may be then alive, jointly with the lawful issue then alive of such as may have predeceased leaving such issue (the division being *per stirpes*): AND we PROVIDE and DECLARE that it shall be lawful to and in the power and option of our said trustees and executors, if they see cause and deem it fit, to postpone the payment of the foresaid provisions of the fee and capital of the residue of our respective means and estates, in the case of all or any of the parties entitled thereto, beyond the term of payment aforesaid, and to apply the interest or other annual produce of the same, during such interval, to and for behoof of the person who, but for this provision, would have been entitled to the fee thereof; or by a deed under their hands to retain the said provisions, or any of them, vested in their own persons, or to vest the same in the persons of other trustees, whom they are hereby authorised to appoint, with all or any of the powers, privileges, and exemptions conferred on themselves, so that the beneficiaries, or any of them, as the case may be, may draw and receive only the interest or other annual proceeds of their respective provisions during their lives, or for such time as our said trustees may fix, and that the capital may be settled upon their children or lawful issue, upon such conditions and under such limitations as our said trustees may think expedient: AND WE DECLARE that the whole provisions hereby made, so far as in favour of or descending upon females, shall be seclusive of the *jus mariti* and right of administration of any husbands they have married or may marry, and shall not be affectable by the debts or deeds of such husbands, or any diligence or execution competent to follow thereon; WITH POWER to our said trustees to SUBMIT to arbitration, or settle by the advice of counsel, all disputed claims competent to or against the said trust-estates, or either of them, or among the parties interested therein; TO COMPOUND and take part for the whole of any disputed debts or claims; TO LEND out the trust-funds on heritable security, or upon the debenture of any railway or other public company, or to invest the same in or lend upon the security of the government funds, heritable property, feu-duties, ground annuals, or the preference or guaranteed stock of any incorporated company with limited liability, AND TO CALL UP and change the said investments from time to time; TO APPOINT any one or more of their own

number, or any other proper person or persons, to be factor or factors under them for the management of the trust-estates, or either of them, and to allow such factor or factors a reasonable gratification for trouble; BUT for the intromissions of such factor or factors, and of any law-agent or law-agents appointed by them, they shall not be liable, provided the party or parties so appointed were reputed solvent at the time [*Insert special limitation of liability as in No. IV., if desired*]: AND WE RESERVE our liferent use of our respective means and estate, AND FULL POWER to us, or either of us, to revoke, burden, qualify, explain, or in any way to alter these presents at pleasure, so far as regards our respective means and estate [*see variations on the clause reserving power to revoke in note to Style No. III.*]: AND WE DISPENSE with the delivery hereof, and DECLARE that these presents, so far as unaltered, though found lying by us, or either of us, or in the custody of any person, undelivered at the decease of us, or either of us, shall have the full effect of a delivered evident; AND we consent to the Registration hereof for preservation.—IN WITNESS WHEREOF, etc.

STYLE NO. VIII.

Proviso as to liability.

Reservation of liferent.

Power to revoke.

Delivery.

No. IX.—*Settlement of whole Estate in trust for Testator's only Son and his Family.—Interest to vest in the Son at majority; whom failing, in his Family at majority, etc., or twenty-one years after Testator's death.—Destination over to the Trustees or their Appointees in trust for the establishment of a School.*

STYLE NO. IX.

I, A. B., being desirous of settling my affairs and providing for the disposal of my means and estate after my decease, and for other good causes and considerations me hereto moving, DO hereby GIVE, GRANT, DISPONE, ASSIGN, CONVEY and MAKE OVER to and in favour of

Disposition to trustees.

and to any other person or persons whom I may hereafter nominate and appoint, or who may be lawfully assumed into the trust, and to the acceptors and survivors and acceptor and survivor of them, the major number of them accepting and surviving and resident in Great Britain from time to time being a quorum, and to the heirs of the longest liver of them, as trustees and trustee for the ends, uses and purposes after mentioned, and to the assignees of the said trustees or their said quorum, or their foresaids, All and Sundry lands, tenements, tacks, heritages, debts, goods, gear, effects, and sums of money, shares in trading or other companies, and in general the whole means and estate, heritable and moveable, real and personal, owing and belonging, or which shall be owing and belonging

STYLE NO. IX.	to me at my decease, or of which I may have the power of disposal,
Appointment of executors.	with the rents, interest, profits, and produce, and writings, titles, and vouchers thereof: AND further, I NOMINATE and APPOINT the said trustees and their foresaids to be my sole executors and executor, and universal intromitters and intromitter with my personal means and estate, with full power to give up inventories thereof, and confirm the same at pleasure, and generally to do everything
Declaration of trust, and grant of special powers.	pertaining to the office of executor: BUT THESE PRESENTS are granted, and are to be accepted by my said trustees and their foresaids in trust, with the powers and privileges, and for the ends, uses, and purposes following, viz.:—THAT THEY MAY, as they are hereby authorised and empowered to do, call, sue for, uplift, receive, assign and discharge the whole debts and effects due and belonging to me;
Power of sale.	WITH POWER to sell, realise, and convert into money the whole of my estates and effects, and sell and dispose of my heritable estate by public roup or private bargain, and for such price or other consideration as they may think fit, but the time, and manner, and propriety of selling my heritable property shall be entirely at the discretion of my said trustees: DECLARING that the debtors to my
Trustees empowered to grant valid discharges.	estate, or the purchasers thereof, or other parties with whom my trustees shall transact, shall have no concern or right to interfere with the application of the sums paid to my said trustees, whose receipts shall be sufficient exoneration for the same: AND my said
Purposes of the trust.	trustees shall APPLY, as they are hereby authorised and empowered to apply, my said estates, and the produce thereof, in manner following, viz.:—IN THE FIRST PLACE, for payment of all my just and
1. Payment of debts and expenses.	lawful debts, sickbed and funeral charges, and likewise of the expenses of this trust, which debts, expenses, and others, my said
2. Destination of residue to testator's son and surviving children, etc.	trustees may pay without requiring legal constitution: IN THE SECOND PLACE, my said trustees shall hold, pay and apply the whole rest, residue and remainder of my said means and estate to and for behoof of my son C. B., whom failing, for behoof of his surviving children, jointly with the issue of any who may have predeceased the period when they would have been entitled to share in the distribution of my estate (the division being <i>per stirpes</i>); which provision in favour of my said son shall vest in and be payable to him
Residue to vest in testator's son at majority. Application of interest.	upon his attaining to majority; and the annual income and produce thereof, or such part thereof as may be necessary, shall be applied for his behoof until he attains the said age, and the remainder thereof shall be added to the principal; and as it is my wish that my said son should receive a sound and liberal education, I request my trustees to see that my wish in this respect is carried into effect; and failing my son before the period when the succession
Vesting of the contingent right.	

would vest in his person, the said residue shall vest in and be payable to his descendants, as above provided, on their respectively attaining majority, or at the period of twenty-one years after my decease, whichever shall first happen: AND LASTLY, in the event of the decease of my said son and the failure of his issue before becoming entitled to payment of the said residue of my means and estate, my said trustees and their foresaids shall execute a conveyance to themselves, in conjunction with such other persons as they may think qualified by residence in the locality, or on other grounds, to assist in the administration of the trust hereinafter expressed, or to such other parties alone, AND to such persons as may be successively assumed into the trust, in virtue of the powers of assumption which my trustees are hereby authorised to confer on their appointees, and to the survivors and survivor of such as accept; whom all failing, to trustees or managers to be nominated by the Court of Session, GIVING and GRANTING to such trustees all or any of the powers which are hereby conferred on my said trustees themselves, including the nomination of a quorum, the power of appointing factors and law agents, and the power of assuming new trustees, under such regulations as the trustees of this settlement may think proper to appoint in the deed of conveyance [or, to the parochial board for the time of the parish of Y., in the county of], of the whole residue and remainder of my said means and estate, or such part thereof as may be in their hands unappropriated at the time, TO BE APPLIED by such trustees [or, by the said parochial board] in the education of poor children whose parents shall reside within the parish of , as well as poor orphan children in the said parish; AND I hereby PROVIDE and DECLARE, that the said trustees [or, the said parochial board] shall have the fullest and most ample powers in the application and management of the funds and estate hereby committed to their charge, and that they may *inter alia* provide or build schools and schoolmaster's house or houses, and other necessary offices; that they may choose and dismiss at pleasure the schoolmaster or schoolmasters, fix their salary or salaries, increase, alter, vary, and modify the same; prescribe and control the management and the course of education and teaching in the school; exact such fees, of such amount, from such of the children, their parents or guardians, as they may think proper; and generally, that they shall have as full discretionary powers as I would have had, had I originated the endowment myself; AND I PROVIDE and DECLARE that, with regard to the investment and management of the trust-estate, the said trustees [or, the said board] shall have the same powers, and that they shall be entitled to the

 STYLE NO. IX.

Destination over to the trustees or their appointees for the endowment of a school.

Powers conferred by this settlement may be conferred on trustees of the charity.

Object of the bequest.

Powers of the trustees of the charity in relation to administration and management.

Powers of the trustees of the charity in relation to investments.

STYLE NO. IX. same privileges and exemptions, as are hereinafter conferred upon the trustees hereby appointed.

[Insert declarations, powers, and other formal clauses, as in No. IV., or such of them as may be applicable.]

STYLE NO. X. No. X.—*Form of Trust-Disposition for purposes to be afterwards declared.—Destination over to Truster's personal Representatives.*

General conveyance.

I, A. B. of X., do hereby GIVE, GRANT, ASSIGN, CONVEY and DIS-
PONE to and in favour of

, as trustees for the purposes after mentioned, and to such other persons as may hereafter be nominated by myself or lawfully assumed by my trustees, and to such of my said trustees as shall accept, and to the survivors or survivor of those accepting, and to the heir of the last surviving trustee, a majority of my accepting and surviving trustees resident in Great Britain for the time being always a quorum, and to the assignees of my said trustees or their foresaids, my whole estate, both heritable and moveable, real and personal, of whatever description, presently belonging to me, or which shall belong to me at the time of my decease: WITH FULL POWER to my said trustees and their foresaids, so far as not otherwise directed by me, to sell my trust-estate by public auction or private bargain, to grant conveyances thereof, and to receive the prices thereof, hereby discharging purchasers from all responsibility as to the application of the price or prices: As ALSO with power to uplift, sue for, and discharge all debts due to me, for the application of which the debtors shall not be answerable: As ALSO to pursue and defend, or to compound, transact, or refer, all questions affecting my trust-estate; As ALSO to grant feus and let leases of my heritable property: As ALSO to enter vassals: As ALSO to name factors and agents, for whom they shall not be answerable further than that they were habit and repute responsible at the time of their appointment; and, in general, with the fullest powers to manage my whole trust affairs as freely as I might have done myself, and against all mortals: AND I hereby BIND and OBLIGE me and my foresaids to make this conveyance effectual, when required, by completing titles in our own persons, and granting special conveyances in implement thereof to my said trustees and their foresaids: But these presents are granted in trust for the

Powers.

Purposes of the trust.

ends, uses and purposes following, viz.: IN THE FIRST PLACE, for payment of my just debts and funeral expenses, and the expenses

of this trust, and for fulfilment of all obligations incumbent on me: STYLE NO. X.
SECONDLY, for the payment of such legacies as I may bequeath by any writing under my hand, though found in my repositories, or in the custody of any third party undelivered at the time of my death: And **THIRDLY**, for payment, delivery, and application of the whole residue of my said estate, both heritable and moveable, real and personal, or the proceeds thereof, in so far as the same may have been sold or otherwise realised, in the manner to be directed or pointed out by any writing under my hand, whether in the form of a deed or of a letter, to be addressed by me to my said trustees or otherwise, and whether the same shall be found in my repositories at the time of my decease, or in the custody of any person to whom I may have intrusted the same; and in default of my leaving such direction in writing, then to convey, dispoise, deliver and pay over my said whole residuary estate, heritable and moveable, to my nearest personal representatives—*[If the destination be to “ heirs and assignees,” the heir’s right of challenge in relation to any codicil or letter of instructions will subsist, notwithstanding the general conveyance to trustees]*—AND FURTHER, I do hereby **NOMINATE**, **CONSTITUTE** and **APPOINT** my said trustees and their foresaids to be my sole executors and universal intromitters with my moveable means and estate, with all the powers competent to executors; AND I **RESERVE** my own liferent of the premises, and full power to alter and revoke these presents in whole or in part: AND I **DISPENSE** with the delivery hereof, and of all writings made in relation hereto, and declare that the same shall be effectual although found in my repositories, or in the custody of any other person to whom I may have intrusted the same at the time of my death: AND I **CONSENT** to Registration for preservation.—IN WITNESS WHEREOF, etc.

SECTION III.

MARRIAGE SETTLEMENTS IN TRUST.

No. XI.—*Form of Contract of Marriage, where the Husband has no available realised property.—Conveyance to Wife of furniture, etc.—Jointure, with allowance for aliment and mournings.—Trust-assignation of Policy of Assurance, and obligation to pay further sum to Trustees within five years in security of the above, and of a provision of a fixed sum for the Children of the marriage, etc.—Renunciation of marital rights.—Conveyance of Wife’s whole estate to Trustees for Spouses in life-* STYLE NO. XI.

STYLE NO. XI.

rent and Children in fee.—Discretionary powers of advancement and restriction, etc.

Acceptance as spouses, and obligation to solemnise marriage.

Provisions by the Husband.

1. Conveyance of furniture, etc., to the wife in case of her survivance.

2. Annuity of £ per annum to the wife in case of her survivance ;

restrictable in the event of a second marriage.

Conveyance to trustees for securing provisions to wife and children.

IT IS CONTRACTED, AGREED, and matrimonially ENDED, between the parties following, viz., A. B., merchant in X., of the one part, and Miss C. D., daughter of E. D., with the special advice and consent of her said father, of the other part, in manner following, that is to say,—The said A. B. and C. D. having conceived a mutual attachment, HAVE ACCEPTED, and hereby do accept of each other as lawful spouses, and PROMISE to solemnise their marriage with all convenient speed, agreeably to the rules of the church : IN CONTEMPLATION of which marriage, and for a provision to the said C. D. in the event of her surviving him, the said A. B. hereby ASSIGNS and CONVEYS to and in favour of the said C. D., in case of her surviving him, the whole household furniture, linen, plate, china, pictures, and books, that may be belonging to him, situated in any house occupied by him at the time of his death, and the whole wines, liquors, and provisions that may be in the said house at the time of his decease : FURTHER, the said A. B. hereby binds and obliges himself, and his heirs, executors, and successors whomsoever, all jointly and severally, renouncing the benefit of discussion and division, to CONTENT and PAY to the said C. D., during all the days and years of her life after his death, a free alimentary liferent annuity or jointure of £ sterling, restricted as after mentioned, payable half-yearly, at Whitsunday and Martinmas, by equal portions, beginning at the first term of Whitsunday or Martinmas that shall occur after his death for the half-year succeeding the said term, with the lawful interest of each term's payment from and after the term of payment until payment, and one-fifth part of each term's payment further, in name of liquidated damages, expenses, and penalty, in case of, and for each failure in, the punctual payment of the said annuity, besides the same itself, and the lawful interest thereof foresaid ; BUT DECLARING, that in the event of the said C. D. entering into a second marriage, the said annuity shall, from and after the first term of Whitsunday or Martinmas occurring after the date of such marriage, be reduced and restricted to the sum of £ sterling per annum, payable at the terms, and with interest and penalty, as is above provided in regard to the said annuity of £ sterling per annum : AND FOR SECURING *pro tanto* the payment of the said annuity and the provisions hereinafter made in favour of the children of the marriage, the said A. B. hereby assigns, transfers, and conveys to and in favour of

and the survivors and acceptors and survivor and acceptor of them, the major number surviving and accepting, and resident in Great Britain, from time to time being a quorum, and to the heirs of the last survivor of the acceptors, as trustees and trustee for the ends, uses and purposes hereinafter written, ALL and WHOLE a policy of insurance effected on his life with the Life Assurance Society, dated the day of , numbered 10,000, for the sum of £ , with the whole sums therein contained, or to become due and payable under the same, and whole consequents thereof, with full power to the said trustees and their foresaids to uplift, receive, and discharge, or assign the same, or any part thereof, and to grant all writings necessary or proper in the premises: AND the said A. B. further BINDS and OBLIGES himself and his foresaids, within five years from the last date hereof, to make payment to the said trustees and their foresaids of the sum of £ sterling, with the interest thereof, at the rate of five pounds per centum per annum, from the time the same becomes due until paid; DECLARING that the said trustees and their foresaids shall apply the said sum of £ sterling, and the proceeds of the said policy, when realised, for the ends, uses and purposes following, namely: IN THE FIRST PLACE, in payment of the expenses of executing this trust: IN THE SECOND PLACE, the said trustees and their foresaids shall pay the annual interest and produce of the said sum of £ to the said A. B. during all the days of his life, for the alimentary behoof of the spouses and the children of their marriage, and the right and interest therein shall not be affectable by his debts or deeds, or the diligence of his creditors: IN THE THIRD PLACE, and upon the dissolution of the marriage, the said trustees and their foresaids shall apply the said sum, and also the proceeds of the said policy when realised, for securing and paying *pro tanto*, alike out of principal as of interest, the foresaid annuity or jointure of £ sterling, restrictable as aforesaid; with power to the said trustees and their foresaids, should they deem it proper, of which they shall be the entire judges, to purchase, secure, and provide a liferent annuity equal to the foresaid annuity of £ , or restricted annuity, on the life of the said C. D., or so much thereof as the funds in their hands may enable them so to purchase from any respectable insurance company, or from such party or parties as they may think proper: AND IN THE LAST PLACE, the said trustees and their foresaids shall hold and apply the rest, residue and remainder of the said sums, if any, and the interest and other annual produce thereof, for securing and paying, *pro tanto*, the provisions hereinafter written in favour of the child or children of the said marriage: AND

STYLE NO. XI.

Policy of insurance.

Husband becomes bound within five years to pay a fixed sum to trustees.

Application of fixed sum and proceeds of policy.

- 1. Expenses of trust.
- 2. Interest of fixed sum to be paid to the husband during marriage for alimentary purposes.
- 3. Upon dissolution of marriage, policy to be held for securing payment of annuity.
- 4. The balance to be held for securing the provisions in favour of the children.

STYLE NO. XI.

Obligation by the husband to pay premiums and keep policy in force.

Trustees to have power, but not to be bound, to keep policy in force.

Husband bound to conform to conditions of policy.

Power to the husband to pay value of policy to the trustees ;

and to require assignation of policy.

Trustees to hold sum paid as an equivalent for the policy, and during marriage apply interest as they are directed to apply the interest of fixed sum.

Provision of £ for mournings ;

a sum corresponding to termly annuity from husband's death till annuity becomes payable, as aliment and family expenses.

Renunciation of *jus mariti* and right of administration.

the said A. B. hereby BINDS and OBLIGES himself, and his heirs, executors, and successors whomsoever, duly and punctually to content and pay to the said insurance company the premium and duty annually falling due on the said policy during all the days and years of his life, and report discharges thereof to the said trustees and their foresaids, and so to free and relieve the said trustees and their foresaids of the said annual payments, and whole consequents thereof: DECLARING that the said trustees and their foresaids shall have right, but shall not be bound, to pay the said premiums out of the remainder of the funds under their charge, or to advance the same themselves, and to charge the said A. B. therewith: AND the said A. B. also BINDS and OBLIGES himself strictly to conform to the whole terms and conditions of the said policy, and to observe and fulfil the same, so that it be preserved in full force and effect during all the days of his life; DECLARING always, as it is hereby expressly provided and declared, that the said A. B. shall have full power and authority, at any time hereafter he may think proper, to pay to the said trustees or their foresaids the sum of £ , AND to require the said trustees or their foresaids to assign and convey to him or his assignees the said policy, sums therein contained and consequents, and the said trustees and their foresaids shall thereupon be bound to reconvey the same accordingly at his expense: AND IN THE EVENT of the said A. B. making payment of the said sum, the said trustees and their foresaids shall hold the same invested in the securities or purchases hereinafter mentioned, and shall, during the subsistence of the said marriage, make payment of the annual interest, or other annual produce thereof, as provided in regard to the foresaid sum of £ : FURTHER, the said A. B. BINDS and OBLIGES himself and his foresaids to pay to the said C. D., one day after his death, in case of her surviving him, the sum of £ sterling, for the purchase of mournings for herself and the family; AND ALSO a further sum corresponding to a yearly annuity of £ sterling, from the period from his death until the first term's payment of the annuity foresaid, and that in lieu of aliment and family expenses for and corresponding to that period: MOREOVER, the said A. B. hereby renounces and discharges his *jus mariti* and right of administration in, of, and in relation to the whole estate and effects now owing and belonging, or which may hereafter be owing and belonging to the said C. D., and provides and declares that the said estate and effects shall be and remain a separate estate in her person, or in the person of such trustees or other persons as she may appoint to hold the same: AND FURTHER, and as a provision to the child or children of the said intended

marriage, the said A. B. binds and obliges himself and his foresaids to content and pay to the said trustees and their foresaids, for the ends, uses, and purposes hereinafter specified, All and Whole the principal sum of £ , and that at and against the first term of Whitsunday or Martinmas which shall occur six months after his decease, with the lawful interest from the said term of payment till payment, which sum of £ sterling shall be held and applied by the said trustees and their foresaids in trust for behoof of the child or children of the said intended marriage, and the survivors and survivor of them, and the issue of the bodies of such of them as may decease leaving such issue *per stirpes*, IN SUCH PROPORTIONS, and under such restrictions, and upon such terms and conditions as the said A. B. may appoint by any writing under his hand; and in the event of the said A. B. failing to exercise the power of division hereby conferred, then in such proportions, and under such restrictions, and on such terms and conditions, as the said C. D. may appoint by any writing under her hand, executed after the decease of the said A. B.; but such deed of division shall not affect any share which may have previously vested in terms of the declaration hereinafter contained: AND FAILING such division, equally to and for behoof of all the said children, or the survivors and survivor of them, jointly with the issue of such of them as may have predeceased leaving issue: WHICH SUM of £ shall be payable to the child or children of the said intended marriage respectively at the first term of Whitsunday or Martinmas that shall occur after the decease of the said A. B., and after the said child or children shall respectively reach the years of majority or be married, whichever of these last two events shall first happen: AND FAILING such child or children and their issue, or in the event of their existing but all deceasing before the said term, the said sum shall be payable to the said A. B., his heirs and assignees, at the first term of Whitsunday or Martinmas that shall occur after the dissolution of the marriage without issue surviving, or after the decease of the longest liver of the child or children of the marriage and their issue as aforesaid: DECLARING ALWAYS that the provisions before made in favour of the said child or children and issue shall not become vested interests in them until the term of payment thereof above mentioned: AND DECLARING that the annual proceeds of the foresaid principal sum of £ shall be held and applied by the said trustees for the maintenance, education, and upbringing, and other necessary expenses of the child or children of the said intended marriage, and the survivors and survivor of them and their issue as aforesaid, until the period of payment of the fee as aforesaid: PRO-

STYLE NO. XI.

Obligation to pay a sum to trustees for children's provisions.

Power of division to the husband, whom failing to the wife, over children's provision.

Failing division, provision to go to surviving children equally and their issue.

Children's provision payable at first term after father's death; and upon attaining to majority or being married.

Failing issue, for behoof of husband and his heirs.

Interests of children to vest at the period of payment.

Discretionary powers in relation to husband's provision.

Interest until period of payment to be applied for children's behoof.

STYLE NO. XI.

Power to trustees to apply principal for children's benefit before term of payment.

Power to trustees to suspend payment of children's shares, and to reduce same to *liferent*;

or to create a trust of such interests.

Obligation by the husband to maintain children.

Settlement of the lady's estate.

Conveyance to trustees of her whole estate.

VIDING and DECLARING always that the said trustees and their fore-saids shall have right, and they are hereby authorised and empowered, to lay out, expend, and apply, before the foresaid term of payment, if they shall think proper, the whole of the foresaid sum of £ sterling, or such part or parts thereof as they may deem fit, for the use or benefit of the child or children of the said intended marriage, or any of them, or for fitting them out in business or in marriage, or otherwise, as the said trustees may deem for the advantage of such child or children, the sum so applied to or for each child not being greater than his or her proportion of the said sum, in manner foresaid; and in the event of the said trustees exercising the said powers, the interest of such child or children as may be paid out, in the annual proceeds of the remainder of the said capital, shall cease and determine: **AND further PROVIDING and DECLARING**, but without prejudice to any deed or writing which may be executed by the said parties as aforesaid, that it shall be lawful to and in the power of the said trustees, if they shall think such course judicious, of which they shall be the sole judges, to postpone or delay the payment of the provisions in favour of all or any of the said children, or such part of the same as to them shall seem proper, till such period or periods as they shall consider fit, or even to restrict the interest of all or any of the said children in the said provision to a *liferent* alimentary provision not affectable by their debts or deeds, or the diligence of their creditors, and to destine the fee thereof to their issue, in such proportions, and on such terms and conditions, as to them may seem most advisable: **AND FOR THESE PURPOSES**, the said trustees and their fore-saids may retain in their own hands, or place in the hands of such trustees as may be appointed by any contract of marriage into which any of the said children may enter, or of such other trustees as the trustees herein named may appoint for the purpose, the whole or any part of the said shares: **AND FURTHER**, the said A. B. **BINDS and OBLIGES** himself and his fore-saids to maintain, upbringing, educate, and support, the child or children of the said marriage in a manner suitable to their station in life, until the sons attain majority, and the daughters attain majority or be married, or until the foresaid provision of £ sterling be payable to them respectively, whichever of these events shall first happen: **FOR WHICH CAUSES**, and on the other part, the said C. D. **ASSIGNS, DISPONES, CONVEYS and MAKES OVER** from her, to and in favour of the said trustees and their fore-saids, **ALL and SUNDRY** lands and heritages, goods, gear, debts, claims, legacies, funds, stocks, and generally the whole property, heritable and moveable, now belonging or resting owing to her, or that shall pertain and become

owing and belonging to her during the subsistence of the said intended marriage, excepting only her provisions before specified, with the whole vouchers and instructions of the premises, and full power and liberty to uplift, receive, and discharge the same, and with all action and execution competent to her thereanent: **DECLARING** that the said estate and effects, and the proceeds and annual interest and produce thereof, shall be held and applied by the said trustees and their foresaids for behoof of the said A. B. and C. D., during the subsistence of their marriage, in alimentary liferent, and for behoof of the survivor of them, also in liferent and as an alimentary provision for behoof of himself or herself, and of the child or children of the said C. D.; and that the fee thereof shall be held and applied for behoof of the lawful children of the said C. D., whether of the present or of any future marriage, and the survivors and survivor of them, and of the lawful issue of such of them as may decease leaving such issue, **IN SUCH PROPORTIONS**, and with such restrictions, and on such terms, and payable at such periods, as the said C. D., or (in the event of her predecease) as the said A. B. may appoint by a writing under her or his hand: **AND FAILING** such appointment, equally to and among the said children, or the survivors of them, jointly with the lawful issue of such of them as may decease leaving issue (the division being *per stirpes*); **AND**, unless otherwise directed in any writing which may be executed as aforesaid, the said provisions shall be **PAYABLE** to the said child or children at the first term of Whitsunday or Martinmas occurring after the death of the longest liver of the said spouses, and after the said child or children shall respectively attain to majority or be married, whichever of these last two events shall first happen: **DECLARING** that the said provisions shall not become vested interests in the said child or children until the term of payment above mentioned: **AND FAILING** such child or children and their lawful issue, or in the event of their existing but all deceasing before the said term of payment of their provisions, then for behoof of the said C. D., and of her nearest heirs whomsoever, or assignees, in fee: **DECLARING** that it shall be lawful to the said trustees, with consent of the said A. B. and C. D., or the survivor of them in life, to withdraw from the said liferent, or, after the lapse thereof and before the child or children of the said marriage shall be paid, to pay or apply a portion or the whole of the estimated share or shares of any of the children of the said marriage in the means and estate of the said C. D. in or towards setting them up in business, or fitting them out in marriage, of the expediency of which, as well as of the amount so to be supplied, the trustees shall be the sole judges; **AND** on the

STYLE NO. XI.

Application thereof

for behoof of the spouses and the survivor of them in alimentary liferent;

and for the children of the lady in fee,

in such proportions as she or the husband, if he survive, may appoint;

failing which, to the surviving children and their issue equally.

Provisions to be payable after death of longest liver of spouses, and after children attain majority or are married;

and to vest at term of payment.

Trustees to have power to anticipate payment to children.

STYLE NO. XI.

And power to restrict to life-rent, as in case of provision made by the husband.

Liferents declared alimentary.

Shares of re-moter issue payable to legal guardians.

In the event of dissolution of the marriage and failure of issue, the surviving spouse may bring the trust created by him or her to a close.

General Provisions.

Jus mariti and right of administration of females excluded.

Provisions to be in satisfaction of legal rights of the spouses.

Discharge of legal provisions

other hand, the said trustees and their foresaids shall have the same power of withholding payment, and the same powers of restriction in regard to the means and estate of the said C. D. as is hereinbefore provided in their favour in regard to the provision hereinbefore made by the said A. B. in favour of the child or children of the said marriage: **DECLARING** that the liferents above written are and shall be strictly alimentary, and not affectable by the debts or deeds of the said spouses, or either of them, or of the survivor of them, or by any diligence or execution, personal or real, competent to follow hereon; and providing that the shares of the whole provisions under these presents falling to such of the issue of the said child or children who may be in minority shall be paid to his or her legal guardians: **AND ALSO DECLARING**, as it is hereby expressly provided and declared, that in the event of the dissolution of the said marriage by the decease of one of the spouses without a living child being procreated of the same, or in the event of a child or children existing, but of such child or children and their issue all predeceasing the survivor of the spouses, the trust hereby created in regard to the means and estate of such survivor shall, upon the execution by him or her of a declaration in writing to that effect, cease and come to an end, and the said trustees and their foresaids shall reconvey and pay such estates, and the proceeds and annual produce thereof, to such survivor and his or her heirs and assignees; **AND ALSO DECLARING**, as it is hereby expressly provided and declared, that the foresaid annuity in favour of the said C. D., and the whole provisions hereby conceived in favour of or descending upon females, whether provided by the said A. B. or C. D., shall be exclusive of the *jus mariti* and right of administration of husbands, and of the debts and deeds of such husbands, or of any diligence or execution competent to follow thereon, **WHICH PROVISIONS** hereinbefore written in favour of the said spouses shall be, and hereby are, accepted of by them respectively, as in lieu and in full satisfaction of all terce or courtesy of lands, *jus relictæ*, or legal share of moveables, and of any and every other right or claim which he or she or his or her heirs, executors, or representatives, could ask or claim by or through the decease of either of the said spouses, or out of the goods in communion between the spouses, the goodwill of each spouse only excepted [*if the husband is possessed of, or has the prospect of succeeding to, English real estate, the following words may be added*: **AND ALSO**, in lieu, and in full bar and satisfaction of the dower or thirds which, at the common law, or by custom, the said C. D. could, or otherwise might claim out of any English estate that may belong to the said A. B.]; and such terce,

courtesy, *jus relictæ*, and other rights, are hereby discharged accordingly; and in consideration of the foregoing provision in favour of the children of the marriage, their right to legitim is hereby discharged, except in the event of legitim being effectually claimed by the children of any subsequent marriage, in which case their right to a share of the legitim fund is reserved; BUT in case of their accepting such last reserved right, they shall be bound to collate and renounce the provisions hereby conceived in their favour by the said A. B.: AND the parties hereto provide and declare that the said trustees and their foresaids, whether acting under the first or second part of these presents, shall be, and are hereby specially authorised and empowered to lend out the trust-funds, or any part thereof, upon the security of lands or houses, or other heritable property, in the United Kingdom, or the debentures of any railway company therein, or on the security of the government funds, or of shares in chartered or incorporated companies in Great Britain; or to invest the same in the purchase of lands, houses, or other heritable property, feu-duties, or ground-rents, in the United Kingdom, or government stock, or of shares in the stock of any chartered or incorporated company in the United Kingdom in which the liability of each shareholder is limited to the value of the stock held by himself; or to retain the same in bank in the United Kingdom, and from time to time to alter and renew the securities as may be necessary, or may seem to them proper: DECLARING that the said trustees and their foresaids shall have the most ample powers in realising and uplifting the interest of the said C. D. in any trust or other estate in which she may be a beneficiary; that they may settle by compromise, arbitration, or by the advice of counsel, any questions which may arise relative thereto; concur in realising, in such manner as they may deem expedient, any such estate, and grant in favour of the trustees, or other parties administering the same, all discharges, ratifications, and acquittances they may deem proper in the premises: THAT they may settle and pay out the amount of the shares of the various beneficiaries entitled to the fee as they become payable, either by conveying a portion or portions of the said means and estates to them, or by paying their shares in money, or partly in the one way and partly in the other way, as to the said trustees shall seem fit, and upon such valuation or estimate of the amount and value of the said means and estates, or any part or parts thereof, as to them shall seem right, whether made by themselves or by others: DECLARING also, as it is hereby expressly provided and declared, that the said trustees shall not be liable for the sufficiency of the

STYLE NO. XI.

Discharge of legitim.
Reservation of right in competition with children of subsequent marriage.
Proviso as to collation.

Power to lend, or to invest, in real or personal security;

to deposit in bank;
to change securities.
Special powers in relation to the realisation and management of the wife's estate.

Power to pay out residuary legatees' shares on valuation of the estate, and by conveying a part thereof.

Provision as to liability for investments.

<u>STYLE NO. XI.</u>	<p>securities upon which they may invest any part of the trust-funds, or of the company from which they may purchase an annuity as aforesaid, provided such security or company was reckoned sufficient at the time of the investment or purchase; nor shall they be liable that the property, funds, or shares which they may purchase with the trust-funds, or any part thereof, shall realise the price or prices at which the same were purchased, but each of them shall be liable for his own actual intromissions only, deducting and retaining his necessary expenses and disbursements, conform to receipts under his hand [<i>See No. IV. for form of special indemnity clauses</i>]: WITH POWER to the said trustees to nominate and appoint any one of their own number, or any other proper person or persons, to act as factor under them in the management of the trust, allowing him or them a reasonable gratification for trouble, for whose management and intromissions they shall not be liable, provided he or they find security for intromissions which was reckoned sufficient at the time it was taken; DECLARING, that so soon as the acting trustees under these presents are reduced to two, they shall be obliged to nominate and assume at least two other trustees to act along with them in the management of the said trust; and there are hereby conferred upon the said trustee or trustees who may be assumed from time to time the whole powers, privileges, and exemptions conferred upon the trustees hereby named: AND IN DEFAULT of any subsequent appointment to be made by himself, the said A. B. hereby nominates, constitutes, and appoints the trustees hereby named, and their foresaids, to be tutors and curators and tutor and curator to any child or children who may be born of the said marriage, with all the powers, privileges, and exemptions hereby conferred upon the said trustees, or belonging by law to the office of guardian, according to the most liberal interpretation; SUBJECT TO the declaration that such tutors and curators shall not be liable for omissions, nor the one for the other, either <i>in solidum</i> or <i>pro rata</i>, but each for his own actual intromissions with the means and estate of the said children, and for his own individual acts of administration: AND BOTH PARTIES consent to the Registration hereof for preservation and execution.—IN WITNESS WHEREOF, etc.</p>
Power to appoint factors.	
Proviso as to exercise of power of assumption.	
Appointment of tutors and curators.	
Limitation of liability of tutors and curators.	
Registration for execution.	

No. XII.—*Form of Contract of Marriage, where the Husband has realised property.—Jointure to Widow ; aliment and mournings.—Discharge of marital rights.—Provision to Children, varying with the number.—Special conveyance of Heritable securities, stock, and interest in Trust-Estate in security of Wife and Children's provisions.—Purposes of trust, and powers.—Conveyance by Wife as in No. XI.*

THIS CONTRACT OF MARRIAGE, entered into by and between the parties following, viz., A. B. of X., of the one part, and Miss C. D., daughter of E. D., Esquire of Y., of the other part, witnesseth that the said A. B. and C. D., having conceived a mutual attachment, HAVE ACCEPTED, and hereby do accept of each other for lawful spouses, AND PROMISE to solemnise their marriage with all convenient speed agreeably to the rules of the Church: IN CONTEMPLATION of which marriage, and for a provision to the said C. D., in case of her surviving him, the said A. B. hereby BINDS and OBLIGES himself, and his heirs, executors, and successors whomsoever, all jointly and severally, renouncing the benefit of discussion and division, to content and pay to the said C. D., during all the days and years of her life after his death, a free liferent annuity or jointure of £ sterling, payable half-yearly by equal portions, beginning at the first term of Whitsunday or Martinmas that shall happen after his death for the half-year succeeding the said term, with the interest of each term's payment, at the rate of £5 per centum per annum, from and after such term until payment, and one-fifth part of each term's payment further in name of liquidated damages, expenses, and penalty, in case of and for each failure in the punctual payment of the said annuity, besides the same itself, and the interest thereof at the rate of £5 per centum per annum ; AND ALSO a further sum of £ sterling, in lieu of aliment and family expenses for the period from his death until the first term's payment of the foresaid annuity, and the sum of £ for mournings: MOREOVER, the said A. B. hereby renounces and discharges his *jus mariti* and right of administration in, of, and in relation to, the whole estate and effects now owing and belonging, or which may hereafter be owing and belonging to the said C. D., and provides and declares that the said estate and effects shall be and remain a separate estate in her person, or in the person of such trustees or other persons as are hereinafter or may be lawfully appointed to hold the same: AND FOR A PROVISION to the child or children of the said intended marriage, the said A. B.

Acceptance as spouses, and obligation to solemnise marriage.

Provisions to wife.

Obligation to pay jointure.

Allowance for aliment and mournings.

Discharge of marital rights.

Provisions to children.

STYLE NO. XII. hereby BINDS and OBLIGES himself and his foresaids, all jointly and severally, renouncing the benefit of discussion and division, to pay to the trustees after named and designed, and their successors in office, as after mentioned, for the ends, uses and purposes herein-after specified, the sums following, viz.: IN THE EVENT of there being only one child of the said intended marriage, or only the issue of one child who may have previously deceased, surviving the said A. B., the sum of £1000 sterling; in the event of there being two children of the said marriage either surviving the said A. B. or represented by lawful issue him surviving, the sum of £2000 sterling; and in the event of there being three or more children of the said marriage, either surviving the said A. B. or represented by lawful issue him surviving, the sum of £3000 sterling; and that at the first term of Whitsunday or Martinmas occurring after his decease, with interest thereon, at the rate of £5 per centum per annum, from and after that term until payment; WHICH SUM, or the subjects hereinafter conveyed to the trustees of this contract in security thereof, shall be held and applied by the said trustees in trust for behoof of the child or children of the said marriage, and the survivors and survivor of them, and the lawful issue of such of them as may have deceased leaving issue, IN SUCH SHARES and proportions, under such restrictions, and payable at such times and in such manner, as the said A. B. may appoint by any testamentary or other writing under his hand [*a qualified power of division is sometimes given to the wife, as in No. XI.*]; AND FAILING such division, equally to and for behoof of the children of the said marriage, and to the survivors and survivor of them, jointly with the issue of such of them as may have predeceased leaving issue (the division being *per stirpes*): AND IN THE EVENT of the said A. B. failing to exercise the power of division hereby reserved to him, the said provisions shall be payable to the child or children of the said intended marriage respectively at the first term of Whitsunday or Martinmas that shall occur after the decease of the said A. B., and after the said child or children shall respectively attain the years of majority or be married, whichever of these last two events shall first happen; and failing such child or children and their issue, or in the event of their existing but all deceasing before the said term, the said sum shall be payable to the said A. B., his heirs and assignees, at the first term of Whitsunday or Martinmas that shall occur after the dissolution of the marriage without issue surviving, or after the decease of the longest liver of the child or children of the marriage and their issue as aforesaid; IT BEING THE INTENTION of the parties that the provisions before made in favour of the children of the

Sums payable in the event of one, two, three, or more children surviving.

Application of sums provided.

Reserved power of division;

failing which, the division to be equal amongst the surviving children jointly with issue, etc.

Provisions to be payable to the children at majority or marriage;

and not to vest until the term of payment.

marriage shall vest in them at and only upon the arrival of the term of payment foresaid: AND FOR SECURING, *pro tanto*, payment of the said annuity, and the provisions hereinafter made in favour of the children of the marriage, the said A. B. hereby ASSIGNS, DIS-PONES, and CONVEYS, to and in favour of

STYLE NO. XII.

Conveyance to trustees in security of the provisions.

and the survivors and acceptors and survivor and acceptor of them, the major number surviving and accepting, and resident in Great Britain, from time to time being a quorum, and to the heirs of the last survivor of the acceptors, as trustees and trustee for the ends, uses, and purposes hereinafter written: PRIMO, A bond and disposition in security, dated the day of , for the sum of £ , granted by

1. Heritable security.

M. N. in favour of the said A. B., with interest from the day of , and also All and Whole [*here describe the lands*], all as specified and described in the said bond and disposition in security, which is registered in the Register of Sasines at

on the day of : SECUNDO, All and Whole the sum of £ of the stock of the Rail-
way Company, conform to a separate transfer thereof, of the date of these presents, executed by the said A. B. in favour of the parties herein nominated as trustees, declaring that the said stock transferred as aforesaid shall be held and applied by the said parties for the same purposes as are hereinafter declared in relation to the estate hereby conveyed to the trustees: TERTIO, All and Whole the whole right, share, and interest now belonging to and vested in the said A. B., or which may hereafter belong to or become vested in him, of and in the means and estate of his parents, or either of them, under or in terms of the marriage-contract entered into between them, dated the day of , and recorded in the Books of Council and Session the days of , including any right, share, and interest which may have accresced or may accresce to him under the provisions of the said contract in consequence of the decease of any of his brothers or sisters, but excepting from this conveyance any right, share, and interest which may have vested or may vest in such brothers or sisters, and may accrue to him as their executor or legatee; AND SPECIALLY EXCEPTING therefrom the principal sum of £ part of his right, share, and interest under the provisions of the said marriage-contract, which is hereby specially reserved to himself to uplift and dispose of at pleasure; with full power to the said trustees and their foresaids to uplift, receive, assign, and discharge the same, and to sue for and recover the same, and to grant all writings and take all steps necessary for that purpose; excepting

2. Personal estate.

3. Interest under an existing trust.

Exception of a part of the subject conveyed in security.

STYLE NO. XII.

Application of the funds conveyed in security.

1. Payment of expenses.
2. Interest to be paid to the husband for alimentary purposes.

3. After husband's death, fund to be applied in the first instance in payment of the jointure.
Trustees empowered to purchase an annuity.

Residue chargeable with children's provisions.

Surplus, if any, to revert to the husband's assignees.
Idem, as to whole residue, in the event of failure of issue.

Proceeds of fund during minority to be applied for the maintenance of the children.

Trustees empowered to anticipate payment of children's provisions.

always from this power the said principal sum of £ , reserved as aforesaid: DECLARING that the said trustees and their foresaids shall apply the subjects hereby conveyed, or which may be realised by them in virtue of the powers herein conferred, for the ends, uses and purposes following, viz.: IN THE FIRST PLACE, in payment of the expenses of executing this trust: IN THE SECOND PLACE, the said trustees shall pay the annual interest and produce of the said estate hereby conveyed to them, so far as realised, to the said A. B. during all the days of his life, for the alimentary behoof of the spouses and the children of their marriage; and the right and interest therein shall not be affectable by his debts or deeds, or the diligence of his creditors: IN THE THIRD PLACE, and upon the dissolution of the marriage, the said trustees and their foresaids shall apply the proceeds of the said estate hereby conveyed to them, when realised, for securing and paying, *pro tanto*, alike out of principal as of interest, the foresaid annuity or jointure; WITH POWER to the said trustees, should they deem it proper, of which they shall be the sole judges, to secure the said annuity, in whole or in part, by purchasing an annuity from any respectable insurance company, or from such party or parties as they may think proper: AND IN THE LAST PLACE, the said trustees shall hold and apply the residue and remainder of the estate hereby conveyed to them in payment of the foresaid provisions in favour of the child or children of the said marriage, and their lawful issue, in terms of the destination above written; AND ANY SURPLUS remaining in their hands after fulfilment of the purposes hereinbefore contained shall be paid to the said A. B., his heirs and assignees: AND FAILING any child or children of the said marriage and their issue, or in the event of their existing but all deceasing without having acquired a vested interest in the provisions above written, the whole residue, after paying or securing the foresaid life annuity, shall be paid and applied in the same manner as is above directed with regard to the said surplus; DECLARING that the annual proceeds of the said estate hereby conveyed to the said trustees shall, after the death of the said A. B., and after paying the said annuity or jointure, be held and applied by them for the maintenance, education, and upbringing, and other necessary expenses, of the child or children of the said intended marriage, and the survivors and survivor of them and their issue as aforesaid until the period of payment of the fee as aforesaid; PROVIDING and DECLARING always, that the said trustees and their foresaids shall have right, and they are hereby authorised and empowered, to lay out, expend and apply, before the foresaid term of payment, if they shall think proper, the whole of the fore-

said estate hereby conveyed, or such part or parts thereof as they may deem fit, for the use or benefit of the child or children of the said intended marriage, or any of them, or for fitting them out in business, or in marriage, or otherwise, as the said trustees may deem for the advantage of such child or children, the sum so applied to or for each child not being greater than the share appointed or falling to him or her out of the said estate in manner foresaid; and in the event of the said trustees exercising the said powers, the interest of such child or children as may be paid out in the annual proceeds of the remainder of the said capital shall cease and determine: AND further PROVIDING and DECLARING, but without prejudice to any deed or writing which may be executed by the said A. B. as aforesaid, that it shall be lawful to, and in the power of the said trustees, if they shall think such course judicious, of which they shall be the sole judges, to postpone or delay the payment of the provisions in favour of all or any of the said children, or such part of the same as to them shall seem proper, till such period or periods as they shall consider fit; OR EVEN to restrict the interest of all or any of the said children in the said provision to a *liferent alimentary provision*, not affectable by their debts or deeds, or the diligence of their creditors, and to destine the fee thereof to their issue in such proportions, and in such terms and conditions as to them may seem most advisable; AND FOR THESE purposes, the said trustees and their foresaids may retain in their own hands, or place in the hands of such trustees as may be appointed by any contract of marriage into which any of the said children may enter, or of such other trustees as the trustees herein named may appoint for the purpose, the whole or any part of the said shares: AND FURTHER, the said A. B. BINDS and OBLIGES himself and his foresaids to maintain, upbring, educate, and support, the child or children of the said marriage in a manner suitable to their station in life, until the sons attain majority, and the daughters attain majority or be married, or until the proceeds of the foresaid estate be payable to them respectively, whichever of these events shall first happen: FOR WHICH CAUSES, AND ON THE OTHER PART, etc. [*as in Style No. XI.*, adding a direction to record the clause of assignation of bond and disposition in security, as above, or any other heritable property which may be the subject of a special conveyance].

STYLE NO. XII.

Trustees empowered to suspend payment of children's provisions.

or to restrict interest to a *liferent*;

or to create a trust.

Obligation by the husband to maintain children.

Settlement of wife's estate.

STYLE NO. XIII.

No. XIII.—*Contract of Marriage where the Husband is presumptive heir to an entailed estate.—Jointure to Widow, secured upon the rents of the estate.—Obligatory provisions to Widow and Children as in preceding examples.*

Acceptance as spouses, and obligation to solemnise the marriage.

Narrative of the husband's titles.

Jointure of £ per annum to the lady under the Aberdeen Act, restricted in terms of that Act.

IT IS CONTRACTED, AGREED, and matrimonially ENDED between the parties following, viz., A. B., Esquire, eldest son of E. B., Esquire of X., on the one part, and Miss C. D. of Y., on the other part, in manner following: That is to say, the said A. B. and C. D. have agreed to accept, and do hereby accept, of each other as lawful spouses, and bind and oblige themselves to solemnise their marriage with all convenient speed, in usual form: IN CONTEMPLATION of which marriage, the said A. B., considering that he is the heir next entitled to succeed after his said father to the entailed lands and estates of X. and others in the counties of E. and F., under the several deeds of entail thereof, viz. [*here narrate the titles*]; and that upon the treaty for the said intended marriage, it was agreed that the said A. B. should, in anticipation of his succession to the said several entailed lands and others, settle and secure to the said C. D., his intended wife, in the event of her surviving him, a jointure to the full amount permitted to heirs of entail by the Act of Parliament passed in the fifth year of the reign of his late Majesty King George the Fourth, chapter eighty-seven, entituled "An Act to authorise the proprietors of entailed estates in Scotland to grant provisions to the wives or husbands and children of such proprietors," but subject to postponement, in terms of the said Act, during the subsistence of a prior jointure on the said lands and others, and subject to all the other provisions of the said Act: THEREFORE the said A. B., as if he had already succeeded to the said several entailed lands and others, and were in possession and infeft therein, does hereby, in virtue of the powers contained in the said Act, and of all other powers and faculties competent to him, PROVIDE and BIND and OBLIGE himself, and the heirs of entail succeeding to him in the entailed lands and estates hereinbefore and after mentioned, duly and validly to infeft and seise the said C. D., his intended wife, in case she shall survive him, in an annuity or liferent provision, out of the entailed lands and others hereinafter described, by way of annuity, of £ sterling per annum, free of all burdens and deductions whatsoever, except property and income tax, during all the days of her life, but subject to postponement, as provided by the said Act, during the subsistence of the prior jointures affecting the said lands and others (if the same shall be subsisting at the

death of the said A. B.), and subject also to restriction, in terms of the said Act, in the event of the said sum of £ exceeding the sum permitted by the said Act, and subject also to the whole other conditions, provisions, and limitations applicable thereto, contained in the said Act: To be uplifted and taken at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at the first of these terms next after the decease of the said A. B. for the half-year immediately following, and so forth half-yearly thereafter in advance, during the lifetime of the said C. D., with a fifth part more of liquidate penalty for each term's failure in payment of the said annuity, and interest thereof, at the rate of five per centum per annum, from the respective terms of payment thereof, during the not payment of the same; furth of All and Sundry the lands and others after mentioned, viz. [*here take in the description of the lands*]: TO BE HOLDEN, the said annuity or liferent provision of £ sterling, subject as aforesaid, upliftable furth of the lands and others before described; but always with and under the conditions, provisions, and limitations expressed in the said Act, by the said C. D. of and under the said A. B., and his heirs and successors in the said lands and others, in free blench farm for payment of one penny Scots money upon the ground of the said lands at Whitsunday yearly, in name of blench farm, if asked only: AND FURTHER, the said A. B. hereby assigns and makes over to the said C. D. as much of the rents, profits, and duties of the lands and others before described as will completely satisfy and pay the said annuity, under the conditions, provisions, and limitations foresaid, yearly and termly, as the same shall become due, with interest as aforesaid, and penalties if incurred; WITH POWER to her to uplift and receive the same from the tenants and possessors of the lands and other heritages before described, and, if necessary, to pursue actions of mails and duties, or of poinding the ground for payment of the same, and all other legal diligence, in so far as the same may be consistent with the terms of the foresaid Act of Parliament: AND it is hereby declared that the said C. D. shall be entitled to receive the foresaid annuity or liferent provision in addition to the revenue of her own fortune, hereinafter provided to her: AND FURTHER, the said A. B. hereby binds and obliges himself, immediately on his succeeding to the foresaid entailed lands and estates, to obtain proper titles thereto completed in his person, and to grant, at his own expense, valid and sufficient corroborative heritable bonds of annuity, and such other deed or deeds as may be requisite or proper for effectually securing the said annuity or liferent provision to the said C. D., but

STYLE NO. XIII.

Description of
the lands.
*Tenendas.*Obligation by
the husband
to complete
titles on his
succession, and
grant corroborative
deeds for
securing the
jointure.

STYLE NO. XIII. always with and under the conditions, provisions and limitations expressed in the said Act; and which annuity or liferent jointure of £ , subject to postponement and restriction as aforesaid, the said A. B., in the event of his surviving his said father, binds and obliges himself, and his heirs, executors and representatives whomsoever, to warrant to the said C. D. at all hands and against all mortals: AND FURTHER, in case the said A. B. shall happen to predecease his father, the said E. B. (in which event the foresaid annuity or liferent provision would not take effect), the said A. B. hereby BINDS and OBLIGES himself [*Provisions in obligatione to the widow and children may be inserted as in the previous examples. The disposal of the wife's fortune will be similar, unless a special trust is to be created, when, of course, the form must depend on the intention of the parties*].

NOTE.—The form here given is applicable to the case where the husband is in the position of presumptive heir to an entailed estate. The form can easily be altered to suit the case where the husband has already succeeded to estates either entailed or in fee-simple. Provisions to younger children may also be secured upon the estate, or the rents, according to circumstances.

SECTION IV.

STYLES OF TRUST SETTLEMENTS *INTER VIVOS*.

STYLE NO. XIV. No. XIV.—*Trust-Disposition of Heritable Estate for sale and division of the proceeds amongst the Truster's Creditors.—Power to effect temporary loan.—Provisions as to interim payment of interest.—Reversion, if any, to be reconveyed to the Truster under deduction of taxed expenses.*

Narrative.

I, A. B. of X., heritable proprietor in fee-simple of the lands and estate of X., Y., and others hereinafter disposed, CONSIDERING that I am owing and indebted to creditors holding heritable securities over my lands and estate hereinafter described, as follows, viz.—To the Insurance Company the sum of £ [insert names of creditors and amounts of debts], as also an annual rent-charge on my said estates for drainage and improvements on the same, amounting to £ per annum, and redeemable on payment of £ or thereby, amounting, the said heritable debts, to

Specification of heritable creditors.

£ or thereby; and whereas I am further indebted to other creditors, viz.—To the sum of £ , with any arrears of interest due on the same; to the sum of £ , and any arrears of interest due thereon; to various persons upon open account and personal obligations a further sum or floating balance, which has been calculated to amount at the date hereof to £ ; and whereas the foresaid debts and obligations due by me cannot be repaid excepting by the sale of parts or of the whole of my lands and estates after described; AND WHEREAS it has been thought advisable for the proper arrangement of my affairs, and for the ultimate payment of all my debts before enumerated, that a sum should be borrowed on the security of my said lands and estates for the purpose of paying off the whole of the said sums due upon open account and personal obligation, and for the further purpose of maintaining a proper management of the said estates until the same shall be sold: and whereas the Insurance Company have agreed to advance the sum of £ for the purpose aforesaid [as also for payment of the debts due by me to , Prior trust. my present trustee, amounting to about £], and for other purposes, for which sum I have already granted, or am about to grant, in favour of the said Insurance Company, a bond and disposition in security over my lands and estate after described; and I have entered into an arrangement with the said Insurance Company and my other creditors, under which it was agreed that I should convey the whole of my said lands and estates, heritable and personal, in trust to and , and to their successors in office, or to co-trustees to be appointed in manner after mentioned, for the purpose of being held by them in trust for the security and benefit of my said creditors, and for repayment to them, according to their respective rights and preferences, of the before mentioned principal sums and whole interest accruing thereon; with full powers to the said trustees both to manage the said estates and to sell and dispose of the whole or such parts thereof as should be found or considered by them to be necessary or proper, according to their judgment and discretion, and to apply the rents and the proceeds of such sales in payment of the said principal sums and interest thereon: THEREFORE I, the said A. B., heritable proprietor foresaid, do hereby give, grant, alienate, dispo- ne, and assign, to and in favour of the said and , and the acceptor and survivor of them, as trustees or trustee for behoof of my creditors foresaid, and for the uses, ends, and purposes, with the powers, and under the conditions, provisions, and declarations after written; DECLARING that the said trustees, Dispositive clause.

STYLE NO. XIV.	<p>and the acceptor and survivor of them, shall have power to manage and execute the trust hereby created, without the consent or concurrence of myself or any of my said creditors being necessary to any acts or deeds done or granted by them, as more fully after expressed; AND ALSO that my said trustees, or the acceptor and survivor of them, shall have power to nominate and appoint or assume into the said trust two trustees, to act either along with them, or after their deaths or resignation, or the death or resignation of the acceptor, as hereinafter provided for; it being hereby stipulated and declared that not more than three trustees shall be acting at any one time, and that in the event of my trustees hereby appointed nominating and assuming two additional trustees, which they are authorised to do if they shall see cause, the right of one of such assumed trustees to act in virtue hereof shall remain suspended until the death or resignation of one or other of my said two trustees, in the event of both accepting, or of the other of the said assumed trustees, in which event the right of the said estate hereby disposed, and the management and execution of the said trust, shall then devolve upon, and be vested in, the said trustees, original and assumed, and to the assignees of the said trustees acting for the time in the said trust, heritably and irredeemably, All and Whole</p>
Power of assumption.	<p><i>[insert the description]</i>: As ALSO All and Sundry other lands and heritages presently belonging to me, and all my right, title, and interest, present and future, in the said lands: As ALSO the rents, mails, profits, duties, and casualties of the lands and other heritages before disposed, now due and payable, or which may hereafter become due and payable, by the tenants and possessors thereof, and all action, diligence, and execution already used and competent to me for recovery thereof: AND FURTHER, I do hereby dispo</p>
Description of subjects of conveyance.	<p>ne and assign to my said trustees, and to their assignees, All and Sundry debts and sums of money due to me at the date hereof: As ALSO all household furniture, farm stock and crops, policies of insurance, and all other moveable goods, gear, estate, and effects of every description pertaining to me; but with the exception of the articles specified in an inventory signed by me, and delivered to my said trustees, which said articles are hereby expressly reserved: AND I OBLIGE myself, and my heirs and successors, to execute and deliver all writs and deeds necessary for vesting in the persons of my trustees and their assignees the estates, both heritable and personal, hereby conveyed: AND I hereby declare that these presents are irrevocable, and shall subsist in full force and effect until the whole purposes hereinafter specified shall have been fulfilled; DECLARING further, that the same are granted by me, and shall be accepted by</p>
Reservation of certain articles.	
Obligation to complete titles.	
Declaration of trust.	

my said trustees in trust, for the uses, ends, and purposes, with the powers, and under the conditions, provisions and declarations, privileges, and immunities after written, and specially to the intent and purpose that my whole lands and estates, and other property, real and personal, hereinbefore conveyed, and the prices and proceeds thereof, or of such parts and portions thereof as shall be sold, shall be held and applied by the trustees or trustee acting in the trust hereby created, for the further security and more sure payment of the debts hereinbefore enumerated, including the said sum of £ , for which a bond and disposition in security has already been, or is about to be, granted in favour of the said insurance company; and that for these ends and purposes the said trustees shall immediately enter into possession of the whole lands and heritages and other property before disposed and conveyed, and uplift, levy, sue for, and recover, the rents, profits, casualties and duties thereof, and all arrears of the same, and proceed forthwith to sell the said lands and estate, or such parts thereof, in manner after mentioned, as they may think proper or advisable; and that the said trustees shall hold and apply the said trust-estate, and all funds derived from the sale or sales of any part thereof, for the purposes following, viz.:—IN THE FIRST PLACE, for payment of the expenses attending the creation of this trust, and the completion of the title of the said trustees to the said trust-estate, and all other expenses attending the execution of this trust, and the management and administration of the trust-estate, including the usual and suitable remuneration to such of my said trustees as shall take the immediate and active charge in the management and sale of my said estates, as the same shall be fixed by the Accountant of the Court of Session for the time; and such trustee shall also be entitled to the usual professional charges for any law business which he may perform in relation to the execution of the trust: IN THE SECOND PLACE, for payment of all blench, feu and teind duties, public, parochial, and local burdens, including the rent-charges payable to the Inclosure Commissioners or others in respect of advances made or received for expenditure in drainage or other improvements upon the said lands and estates, and also for payment of the expense of keeping in proper repair the mansion-house and offices, farm and other houses and buildings, and the fences and drains upon the said lands and estates, so far as such repairs are incumbent on the proprietor, or are, in the opinion of the said trustees, advantageous to the said estates; AS ALSO the expense of making and keeping in repair such additional houses, fences, and drains as my said trustees shall consider necessary to be erected or constructed on the said

STYLE NO. XIV.

Direction to realise;

and to sell the heritable estate.

Purposes of trust.
1. Expenses of execution.

Remuneration of the trustee.

2. Expenses of management of the property.

STYLE NO. XIV.**3. Payment of interest ;**

including pre-
miums on
policy of in-
surance.

Unpaid arrears
of interest to be
accumulated
with the princi-
pal.

**4. Trustees em-
powered to ob-
tain a further
temporary ad-
vance.**

lands ; together also with the expense of insuring said buildings, furniture, and other moveable effects foresaid against losses by fire, with all such other expenses as my said trustees, in the exercise of their discretion, shall judge necessary, and may incur in the proper management and preservation of my said lands and estates, heritable and personal : IN THE THIRD PLACE, after satisfying the purposes before specified, the said trustees shall apply the remainder of the rents and annual produce of the said estates during the subsistence of this trust, and also the proceeds of my personal estate when realised, and the prices of lands to be sold, in payment of the interest of the several debts before specified, and that half-yearly and termly as they respectively fall due, according to the legal priority and preference of the said debts ; and after payment of interest, then in payment of such portion of the principal sums as my said trustees shall have sufficient funds at the time to pay off ; and also in payment of the premium, amounting to £ per annum, upon a policy of insurance for £ , effected on my life on the day of , with the Insurance Company of Scotland, and that regularly as it becomes due, during the subsistence of this trust, or until the debts in security of which the said policy has been assigned shall have been paid and discharged, if they shall have been so paid and discharged during the subsistence hereof : AND I hereby authorise and empower my said trustees, if they shall consider it to be advisable, to surrender the said policy of insurance, or to sell and dispose thereof in such way as they may consider best for the interests of the trust-estate : AND in respect that the foresaid advance of by the Insurance Company is postponed to the foresaid preferable heritable securities, amounting to £ , it is hereby provided, that in the event the rents and annual proceeds at the time, and the price received for lands sold, or balance thereof remaining in the hands of the trustees, shall not be sufficient to enable them to pay at each term of Whitsunday and Martinmas the whole interest on the debt then due to the said Insurance company, at the rate of five pounds per centum per annum, then such amount of unpaid interest shall at each of said terms be accumulated with the said principal debt or balance remaining due thereof, and the whole as a principal sum shall bear interest at the said rate until the same shall be paid up out of rents subsequently received, or the prices of lands sold : IN THE FOURTH PLACE, in the event that my said trustees, in the course of their management of the said estate, shall consider it necessary or advisable to obtain a further temporary advance of money, for the better and more advantageous arrangement of my affairs, until sales shall

have been effected to the full extent necessary for the fulfilment of the trust purposes, it is hereby declared that it shall be competent to my said trustees, and they are hereby empowered, to obtain a further advance of money on the security of the said estates from the said Insurance Company, to an extent not exceeding £ of principal; which further advance shall rank *pari passu* with the foresaid sum of £ already advanced or about to be advanced by the said Insurance Company, and shall be secured and be repayable, with interest and penalties, in the same way and manner as the said sum of £ : IN THE FIFTH

STYLE NO. XIV.

5. Allowance to the truster.

PLACE, for payment of such an allowance to me, during the subsistence of the trust, as my said trustees, having regard to the amount of interests annually exigible, the amount of debts payable out of the said estates, and other circumstances connected with the trust affairs, shall in their own judgment and discretion deem right and proper: IN THE SIXTH PLACE, I hereby authorise, empower, and direct my said trustees forthwith to bring to sale the whole lands and estates hereby conveyed, and after advertisement thereof, in such way as they may deem best calculated to effect an advantageous sale, of which they shall be the sole judges, to sell and dispose of the said lands, in whole or in part, by public roup or private bargain, as they may consider most beneficial, and at such price or prices as can be obtained for the same, and to take all proceedings and execute all deeds which may be necessary for giving full effect to the said sale; and in the event of the said lands being sold, and of any sale thereof not being implemented, I give full power to my said trustees to rescind any such sale, and also to re-expose the said lands, in whole or in part, until the purposes of the trust shall have been fully accomplished: AND for the purposes aforesaid I hereby nominate, constitute, and appoint the said

6. Sale of whole estate for liquidation of debts.

Grant of power of attorney to the trustees.

and , and the acceptor or survivor of them, and the trustee or trustees to be assumed in manner foresaid, to be my commissioners and attornies or commissioner and attorney, irrevocably appointed to act in all matters and particulars relating to or concerning the said intended sale, with power to them or him to enter into minutes of sale, articles of roup, and prorogations thereof, and specially to grant, subscribe, and deliver a disposition or dispositions of the said lands and estates so to be sold in favour of the purchaser or purchasers, and all other necessary deeds and conveyances connected with or requisite in the premises, and containing all the usual and proper clauses, agreeably to the laws and practice of Scotland in the like cases; And which deed or deeds so to be executed by my said commissioners or commissioner shall be equally

STYLE NO. XIV.

effectual to all intents and purposes, and equally binding and obligatory upon me, my heirs and successors, as if subscribed by myself; And I do accordingly oblige me and my foresaids to ratify and confirm the same in every respect and particular; with power to my said trustees to receive and discharge the price or prices of the lands so sold, or to take such security for payment thereof as they shall think proper, and generally to do every other act or deed in carrying out the said sale which shall be necessary or proper, or which I could do myself, the purchaser or purchasers being in no way concerned with or bound to see to the application of the price or prices:

Purchasers not to see to the application.

7. Application of the proceeds. Payment of heritable creditors according to their preferences.

IN THE SEVENTH PLACE, I appoint and ordain that my said trustees, so soon as the whole or any part of my said estates shall have been sold and the prices thereof received, or so soon as there shall be sufficient trust-funds from the sale or realisation of any part of my personal estate, and after payment of trust expenses and of the interest due at the time on the before mentioned heritable debts, forthwith to proceed to pay off and obtain discharges of the principal sums of the said heritable debts, including the foresaid sum of £

Payment of unsecured debts.

to the said Insurance Company, and that to the extent of the trust-funds then in hand, and according to the respective rights of preference among the said heritable creditors, or in such other order as may be agreed to among the said creditors themselves; and so forth from time to time, as successive sales or realisation of funds shall take place, and until the whole of the said heritable debts, principal, interest, and expenses shall have been fully paid and extinguished: AND after payment in full of the said heritable debts, then my said trustees shall apply the remainder, or as much as may be requisite, of the said trust-funds in payment of the said unsecured debts due by me to and , with all interest which may be due upon the said debts, and all expenses which may have been incurred in connection therewith, and for the payment of which I am legally liable; And in the event of the reversion of my said estates, heritable and personal, hereby conveyed, after payment of the preferable debts first before enumerated, and expenses of the trust, and all obligations undertaken by my said trustees in the execution of these presents as hereinbefore specified and authorised, not being sufficient for payment of the said unsecured debts due to the said and , then I appoint my said trustees to divide such reversion or surplus between the said and in proportion to the amount of

Trustees bound to account to the truster.

their said respective debts, interest, and expenses: IN THE LAST PLACE, my said trustees shall be bound and obliged, as by acceptance thereof they bind and oblige themselves and those to be assumed by

them in virtue hereof, after the whole purposes of this trust, as STYLE NO. XIV.
 hereinbefore specified, shall have been fulfilled and discharged, to
 account to me for their actings and intromissions in virtue hereof;
 and shall further be bound, in the event of my requiring them to
 do so, to lay their whole accounts of business incurred by them to
 professional men employed by them before the Auditor of the Court Taxation of
accounts.
 of Session for taxation, whose report thereon, interim or final, shall
 be binding on me and my successors; and in so far as relates to the
 accounts of intromissions and cash transactions, the same shall be
 submitted for audit, in the event of my so requiring, to
 accountant in _____, whom failing, to
 accountant in _____, and declaring that the report by such
 accountant shall be final and binding on me and my successors:
 AND my said trustees shall be bound and obliged, as they by accep- Payment and
reconveyance
of the reversion.
 tation hereof BIND and OBLIGE themselves, to pay over to me, my
 assignees or successors, any balance which may be due on said
 accounts of intromissions as the same may be fixed by the said re-
 port, and also to reconvey to me any part or portion of the said
 estates, heritable or moveable, which may not have been sold and
 disposed of for the purposes foresaid: AND for the more effectual Grant of special
powers.
 accomplishment of the foresaid purposes, I hereby give full power
 to my said trustees, acting for the time in the trust hereby consti-
 tuted, to make up and complete in my person, or in the persons of Power to com-
plete titles.
 themselves, as trustees foresaid, all proper titles to the lands and
 estate before disposed, or to any part or parts of the same, whereof
 the titles may be incomplete, and to have me served heir to any of
 my ancestors, and to procure me or themselves infeft and seised in
 any part of the said whole lands and estates, and to obtain the full
 right thereto vested in their persons as trustees foresaid, and to grant
 and receive all deeds which may be necessary for those purposes:
 AND in order that the title to the said lands or any of them may
 be the more readily made up and completed in the person either of
 myself or my said trustees, I hereby specially and irrevocably make Procuratory
to trustees to
obtain truster
served.
 and constitute the said _____ and _____, conjunctly and
 severally, my lawful procurators, for me and in my name to obtain
 me served and retoured heir to _____ or any of my deceased
 ancestors or collateral relatives, through whom my title to the said
 lands and estates, or any part of them, falls to be made up; And
 for that purpose, I do hereby authorise my said procurators to
 present petitions to the Sheriff of Chancery, Sheriff of Edinburgh,
 or Sheriff of the shire in which the lands lie, and to sign the same
 on my behalf, as heir in general or of provision, or heir in special,
 as the case may be, and to carry out the proceedings in such ser-

STYLE NO. XIV.	vices, and to take out, purchase, and obtain all necessary charters, infestments, decrees of service, retours or others, in the same manner, and as fully and freely in all respects, as I might do myself; Ratifying hereby and confirming whatever my said procurators shall lawfully do or cause to be done in the premises: WITH FULL POWER
Power to let the mansion-house and shootings;	also to my said trustees, if they shall consider it advisable for the interests of the trust, to let the mansion-house of either furnished or unfurnished, and the shootings on the said estate, for such period and at such rents as they may consider necessary and
to cut timber;	proper; to cut down and thin, or to sell and dispose of, the woods and plantations growing upon the said lands and estate, so far as
to work minerals;	not prejudicial to the amenity of the said lands; to work and raise all metals, minerals, and stones within the bounds of the said lands, and to execute and authorise any works which may
to lease the lands, minerals, etc.;	be necessary for that purpose; to output and input tenants, and to grant leases of the lands and other heritages before disposed for such duration as they may think right, and of the mines, metals, minerals, and stone quarries therein, or any part or parts thereof, fisheries or fishings belonging or attached to the said lands, upon such terms and conditions, and for payment of such rents or lordships, as my said trustees may think proper; to
to abate rents;	grant such temporary or permanent abatements of rents as in the circumstances shall appear to my said trustees to be necessary; to
to compound; to refer; to pursue and defend.	compromise, compound and transact, submit and refer, prosecute and defend all claims, of whatever description, made by me against third parties, or at the instance of third parties, in relation to my said estates, and generally to do everything in the premises which I could have done myself before granting hereof, and all of which
Special powers to redeem rent-charges.	I BIND and OBLIGE myself to ratify and confirm; with power also to redeem the rent charges affecting the said lands and estate in whole or in part, and also to enter and receive vassals in all lands or other heritages holden or to be holden of me as superior thereof, and to grant all charters, precept of <i>clare constat</i> , or other writs that may be necessary; AS ALSO to remove and appoint, by deed of factory or otherwise, any factor and commissioner or factors and commissioners, attornies, agents and cashiers under them, for carrying into execution any of the purposes of this trust, with or without cautioners for their intromissions, with such reasonable salaries or other remuneration for their trouble as the said trustees may consider just and proper: DECLARING hereby that my said trustees shall not be personally responsible for the solvency, or management, or intromissions of any of the said factors, attornies, agents, or cashiers, nor for one another, nor for the solvency of any bank in
Power to remove and appoint factors and agents.	
Indemnity clause.	

which the funds of the trust may be deposited, but only for their individual intromissions with my said estate: AND it is hereby specially PROVIDED and DECLARED, that in the event of the said trustees hereby appointed accepting of the said trust, they shall be at full liberty to resign the same on giving to me three months' notice of their intention, by letter addressed to me or to my known agent in Scotland, and transmitted through the General Post Office; but the resignation or death of any of the said trustees shall not prejudice the operation of this trust, which shall subsist to the full effect herein specified, and until the whole purposes shall have been accomplished, though only one of the said trustees shall accept and survive and act, and who shall be entitled and bound to assume additional trustees in virtue of the power hereby conferred, with the whole rights, privileges, powers, and immunities conferred on the trustees hereby appointed, and to carry out the purposes of the trust upon the terms hereof: BUT DECLARING, that if all the trustees hereby named or to be assumed or appointed, or the last acceptor or survivor of them, shall die or resign and denude without appointing a successor or successors, then the said Insurance Company shall be entitled, and they are hereby authorised and empowered, so long as the foresaid debt to them, or any part thereof, shall be unpaid, by any deed to be granted by their manager or directors, to nominate another trustee or trustees for the purpose of carrying out and completing the whole purposes for which the present trust-disposition is granted, and with the whole powers, privileges, and immunities hereby conferred on the trustees before appointed: AND I hereby BIND and OBLIGE myself and my heirs and successors to grant all deeds and writings of every description that may be necessary or proper for fully vesting the whole trust-estate hereby conveyed, either in the persons of the trustees hereby nominated, or of the trustees to be assumed or otherwise appointed as aforesaid; it being hereby declared, that notwithstanding the death or denuding of all or any of the said trustees, the trust hereby constituted shall nowise cease or become void thereby, but this present trust, and the real rights created under the same and in virtue hereof, and all that may follow hereupon, shall stand and subsist as a security to my said creditors, including the Insurance Company, so long as the debts due to them as aforesaid, or any part thereof, shall remain unpaid: AND it is hereby expressly CONDITIONED and DECLARED that the said original trustees, and their successors in office, shall be BOUND and OBLIGED to exhibit to the said Insurance Company, for the information of the said company and of my other creditors, and

STYLE NO. XIV.

Power to resign.

Sole trustee bound to exercise power of assumption.

Power to creditor to appoint new trustees.

Truster bound to convey to new trustees.

Trust not to lapse till purposes are fulfilled.

Trustees bound to exhibit accounts to the creditors,

STYLE NO. XIV. that annually, or as often as they shall be required so to do, full states of the trust affairs, containing an account of their whole receipts and payments connected with the trust, as well in the management of the said lands and estates as with sales thereof, and payments made to the said creditors or others out of the rents and prices or other proceeds of the trust-estates, with such other information as may be necessary fully to inform my said creditors as to the trust management and the position of the trust at the time.

and to give information. [Insert a clause revoking and recalling any previous trust that may be in operation, and provision for payment of expenses under it.] All

Revocation of previous trust. which conditions, provisions, declarations, purposes, and powers herein contained, shall be duly recorded in the General Register of Sasines, whereby the real right to the said lands is to be constituted in the persons of the said trustees, and shall be inserted or validly referred to in all future rights in favour of them or their successors in office, but shall not be inserted in the rights or dispositions to be granted in favour of the feuars or purchasers of the said lands,

Clause of Direction. or others deriving right from the said trustees: WITH ENTRY to the said lands and estates, and possession of the said personal estate immediately on the execution hereof: AND I RESIGN the said lands and others for new infeftment, but always in trust only, and for the uses, ends, and purposes, and with and under the conditions, provisions, declarations, and powers before written; AND I ASSIGN the writs, title-deeds, and leases of the said lands and others; AND I ASSIGN the rents; and I GRANT warrandice; and I CONSENT to Registration hereof for preservation and execution, and also to registration in the General or Particular Register of Sasines.—IN WITNESS WHEREOF, etc.

Feudal clauses.

STYLE NO. XV. No. XV.—*Trust-Disposition omnium bonorum for behoof of Creditors.—Concise Form, containing provision for Trustees' discharge, and power to apply for sequestration.*

I, A. B., Merchant in , considering that I am indebted and owing to different parties various sums of money, and that my circumstances have become embarrassed, and seeing that with the view of my means and effects being distributed among my creditors according to their respective rights and interests, I have resolved to grant these presents in manner under written: THEREFORE, I do hereby DISPONE, ASSIGN and CONVEY to and in favour of A. B., accountant in , whom failing by death, incapacity, resignation, or otherwise, to C. D., accountant there, as trustees to act in suc-

Dispositive clause.

cession, in manner after written, for behoof of all my just and lawful creditors, as at the date hereof, my whole estate and effects, heritable and moveable, real and personal, presently belonging and owing to me, or which may belong and be owing to me, or to which I may acquire right during the subsistence of this trust, and particularly, without prejudice to the said generality, my whole stock-in-trade, shop-fittings, and the whole debts due and owing to me, with the whole writs, vouchers, and instructions thereof, and all that has followed or may follow thereupon, and my whole right and interest therein, present and future: BUT DECLARING that these presents are granted by me, and shall be accepted in trust, for the uses, ends, and purposes, with the powers and under the conditions, provisions and declarations after written; viz., That my said estate, and prices and proceeds thereof, shall be held and applied by the acting trustee for the security and payment of the debts due to all my just and lawful creditors, as at the date hereof, according to their several rights and preferences; and for that end, that the acting trustee shall, as speedily as may appear to him expedient, sell and dispose of my whole estate, including my said stock-in-trade, shop-fittings, and other effects, and that either by public roup or private bargain, as he may think proper, and either in whole or in lots, as to him may appear most advisable, and realise all the debts which may be owing to me; and the said trustee shall apply my said estates and the proceeds thereof as follows—viz.: IN THE FIRST PLACE, for payment of the expenses attending the creation and execution and the management of the trust, including a suitable remuneration to the acting trustee, and for payment to the said trustee of all advances made or obligations undertaken by him in execution of the trust: SECONDLY, for payment to my creditors at the date hereof of their several debts and interests thereon, according to their preferences, and conform to a division to be made and authorised by the acting trustee; providing always that the creditors shall be ranked and preferences admitted only in the same manner and to the same extent as if my estates had been sequestrated under the Bankrupt Statutes at the date of the execution of these presents; and declaring that each creditor shall, if required, depone to the verity of the debt, and assign the said debt to the extent of the sums received at the expense of the trust-estate to the acting trustee and the other trustees in their order, or to any person whom the acting trustee may appoint: AND DECLARING, that in the event of any of my creditors declining to accede to the trust hereby created, the said trustee is hereby authorised on my behalf to apply for sequestration of my estates under the Bankrupt Sta-

STYLE NO. XV.

Declaration of trust.

Direction to sell.

1. Payment of expenses.

2. Payment of creditors according to the order of their preferences.

Trustee authorised to apply for sequestration.

STYLE NO. XV. tutes: AND FURTHER PROVIDING, that when any division is to be made of the funds, the acting trustee shall give notice of the time of payment to all the creditors claiming by circular letters; and if any of the said creditors shall neglect to demand, or shall refuse payment of their share of the trust-funds, and shall refuse to grant the conveyances, discharges, or other writings which the said trustee shall lawfully require, or if any of the said creditors shall be legally incapacitated to receive such payments, then the said trustee shall have full power, after the expiration of three months from the time of payment to be fixed, either to consign in his own name the dividends of such creditors in any chartered bank for behoof of the parties entitled thereto, or to apply the same in payment of the debts due to the other creditors, reserving to the creditors so refusing, their claims for the said dividends out of the first and readiest of the trust-funds which may be afterwards realised: DECLARING that the acquiescence in or accession to this trust-deed, by any of my said creditors, shall import a discharge by them in my favour of all debts, sums of money, and obligations due and owing by me to them or any of them at and prior to the date of these presents, and that acceptance of payment or of a final dividend by any of my creditors acceding as aforesaid, shall import a discharge by them to the acting trustee of his intromissions with the funds and estate hereby conveyed: AND I GRANT FULL POWER to the acting trustee to appoint law agents under him for any of the purposes of this trust, and to allow them a suitable remuneration: AND also to COMPOUND and TRANSACT, or to SUBMIT to arbitration, all questions and disputes arising in his management, or in connection with the estate hereby conveyed: AND DECLARING, as it is hereby PROVIDED and DECLARED, that the said trustee acting in the trust hereby created, shall not be obliged to do diligence otherwise than as he shall think fit, nor shall he be liable for omissions, but for his own actual intromissions only, nor shall he be liable for factors, nor for the insolvency of bankers, debtors, purchasers, cautioners, and others, further than that such persons were habit and repute responsible at the time they were intrusted: AND I BIND and OBLIGE myself and my foresaids to warrant the above written conveyance and these presents at all hands and against all mortals: AND I CONSENT to the Registration hereof for preservation and execution.—IN WITNESS WHEREOF, etc.

Notices.

Consignation of dividends.

Accession to be equivalent to discharge of trustee; acceptance of dividends to discharge the trustee.

Powers.

Indemnity clause.

STYLE NO. XVI.

No. XVI.—*Trust-Disposition omnium bonorum for behoof of Creditors ; containing provisions authorising trusteer to carry on business under inspection ; and authorising trustee to carry on business for behoof of Creditors ; and power to apply for sequestration ; and appointment of a Committee of Creditors to advise with trustee.*

I, A. B., Manufacturing Engineer in _____, CONSIDERING that my affairs have become embarrassed, and that I am unable to pay the debts owing by me, and that I have been requested by my creditors to grant the trust-disposition underwritten: Therefore, I have assigned and disposed, as I do hereby ASSIGN, DISPONE, TRANSFER, CONVEY and MAKE OVER from me and my heirs and successors to and in favour of C. D., Accountant in _____, as trustee, for the ends, uses, and purposes, and with and under the powers, conditions and provisions afterwritten: ALL and SUNDRY lands and other heritages, stock-in-trade, working tools, plant and machinery, debts and sums of money, and whole other means and estate of every description, heritable and moveable, real and personal, wherever situated, now belonging or owing to me, or which shall belong or be addebted to me before the debts due by me at the date hereof are paid or settled and discharged as aftermentioned, with the whole writs, titles, vouchers, and instructions thereof, and all that has followed, or may follow thereon, and my whole right and interest, present and future, therein; and I BIND myself to grant, execute, and deliver, to and in favour of my said trustee, all deeds necessary or proper for completing his title to the means and estate hereby conveyed, or in connection therewith, when required so to do: BUT DECLARING that these presents are granted by me, and shall be accepted in trust, with the powers, and for the uses, ends, and purposes, and under the conditions, provisions, and declarations afterwritten, *videlicet*: WITH POWER to the said trustee to enter upon the possession of the means and estate hereby conveyed, and complete his title thereto at such time or times as to him shall seem proper; to allow me to continue to carry on under his inspection, and subject to his orders, and for such time as he may think right, the business at present carried on by me of a manufacturing engineer; to require me to account to him, or to my creditors after-mentioned, for any profits which I may make in said business; to inspect my business books, letters, and correspondence, whenever he may think right so to do; or himself to carry on at the risk, and for the benefit of my creditors after-mentioned, and for such time as he may think

Narrative.

Dispositive clause.

Obligation to grant other deeds necessary to complete title.

Declaration of trust.

Powers to trusteer.

1. To enter on possession of estate.
2. To allow trusteer to carry on business under inspection;
3. To inspect business books and correspondence;
4. Himself to carry on the business for benefit of the creditors

STYLE NO. XVI.	right, the said business of a manufacturing engineer at present carried on by me; to appoint a person or persons to manage and conduct the same under his inspection; to purchase at the expense of the trust-estate such goods and articles as may be required for the business, and generally to do everything necessary or proper for
5. To submit to arbitration, and to compromise;	the efficient conducting and carrying on thereof; to submit to arbitration, or settle by the advice of counsel, or to compromise all disputed claims competent to or against the trust-subjects and estate; to compound and take part for the whole of any disputed debts or
6. To collect debts;	claims; to collect and realise the whole debts due, or to become due
7. To sell estate.	to me; to sell, realise, and convert into money, either by public roup or private bargain, as to him shall seem right, the means and estate, heritable and moveable, hereby conveyed, or such part or parts thereof as he may think proper, and that in such lot or lots, at such time or times, and on such conditions as he may judge
Debtors and purchasers not to be concerned with application of money.	expedient: DECLARING that debtors to, or purchasers of my estate shall have no right to inquire as to the application of the sums paid to the said trustee, but shall be fully exonerated and discharged by his receipt; and the said trustee shall hold, pay, and apply the said means and estate hereby conveyed, and prices and proceeds thereof, and profits, if any, of the said business,
Purposes of trust.	if carried on, in manner following, <i>videlicet</i> : IN THE FIRST PLACE , in security and for payment of the expenses attending the
1. Expenses of execution and carrying on business.	creation, execution, and management of this trust, including the expenses of the said business, if carried on, and for payment to the said trustee of all advances made, or obligations undertaken by him in execution of the trust hereby created; and of a
2. In security and satisfaction of truster's debts, or of composition thereon.	suitable remuneration to himself: IN THE SECOND PLACE , my said trustee shall hold and apply the residue of my said means and estate, and the whole proceeds and profits thereof, in security and towards payment of the debts due by me to those persons who at the date hereof are my just and lawful creditors, and who shall accede hereto, or of such composition thereon as they may agree to
Failing composition arrangement, trustee to enter on possession of, and realise estate;	accept: DECLARING that in the event of my failing to make payment of any composition which my said creditors may agree to accept upon my said debts due to them, or of any instalment of any such composition, or of its appearing to the said trustee that I am not carrying on my said business in a proper manner, or that it is not probable that I shall be able to pay such composition or any instalment thereof, of all which the said trustee shall be the sole judge, or in the event of my not making any offer of composition to my creditors, or of such offer not being accepted by them, not only shall such composition arrangement as may have been agreed to fall and

become void and null, but in any of these events it shall be lawful to and in the power of the said trustee forthwith to enter upon the possession of the means and estate hereby conveyed, and complete his title thereto, if he shall not have previously done so, and realise the same, all in manner before mentioned ; and, after satisfying the first purpose hereof, to apply the said means and estate, and proceeds thereof, in payment of my said debts due to my said creditors ; and which payments shall be made from time to time as the said trustee may be in funds for that purpose, and as he, with consent of the committee of my creditors afternamed, shall think fit ; providing always that creditors shall be ranked, and preferences admitted, only in the same manner and to the same extent as if my estates had been sequestrated under the Bankrupt Statutes at the date of these presents, and that the value of any securities held by any of my creditors shall be ascertained, and the said trustee shall be at liberty to adopt one or other of the alternatives, and have the claims adjusted and disposed of, all as provided for in the Bankrupt Statutes now in force in the case of a sequestration ; **AND** **DECLARING** that each creditor shall, if required, make a solemn declaration to the verity of his debt, and assign the same to the extent of the sums received, and at the expense of the trust-estate to the said trustee, or to any person whom he with consent foresaid may appoint : **AND LASTLY**, after fulfilling the foregoing purposes of this trust, the said trustee shall account for and pay over the whole rest, residue and remainder of the means and estate hereby conveyed, if any, to me and my heirs and assignees ; and in the event of any of my creditors declining to accede to the trust hereby created, I **AUTHORISE** the said trustee on my behalf to apply for sequestration of my estates under the Bankrupt Statutes, of the necessity of which application the said trustee shall be the sole judge : **AND I EMPOWER** the said trustee to do everything necessary or proper for carrying out this trust as fully, freely, and effectually as I could do ; and particularly and without prejudice to the said generality, I **EMPOWER** him to give such notice as he may think fit to my creditors to lodge their claims and grounds of debt, and of the time of payment of any dividends which may be paid under the trust hereby created : **DECLARING** that E. F., merchant in ; G. H., manufacturer there ; and J. K., bank agent there, three of my creditors, shall have power to act as a committee to advise with and superintend the said trustee in the management of, and to concur with him in all submissions and transactions that may arise under the trust hereby created, and generally to give him such advice and assistance in the pre-

STYLE NO. XVI.

and apply it in payment of trustor's debts.

Creditors to be entered and preferences admitted only as in a sequestration.

Creditors, if required, to make a declaration to verity of debt, and assign it.

Surplus, if any, to be conveyed to trustor.

Power to trustee to apply for sequestration ;

and to give notice to creditors to lodge claims, and of payment of dividends.

Appointment of committee of creditors to advise with trustee.

STYLE NO. XVI. **mises** as to them may seem proper ; with power to them to examine his acts and intromissions ; to audit his accounts ; to decide with regard to paying or postponing payment of any dividend ; to fix the trustee's remuneration, and to assemble at any time during the currency hereof, for the purpose of ascertaining the position of the trust affairs, and for giving the trustee such instructions there-
Acquiescence of anent as may be requisite and proper: **DECLARING** that the ac-
creditors to im- quiescence in or accession to this trust-deed by any of my said
port discharge creditors, and the acceptance of payment, or of a final dividend,
of debts. shall import a discharge by them in my favour of all debts, sums
of money, and obligations due and owing by me to them at and
Trustee to have prior to the date of these presents ; and that it shall be in the
power, with con- power of the said trustee himself, with consent of any two of the
sent of two of said committee of my creditors, if he shall be satisfied that I have
committee, to made a full and fair surrender and disclosure of my estates, and
discharge trust- given the necessary assistance for the recovery thereof, and have
er. acted correctly, to grant in name and on behalf of my creditors,
and at my expense, a formal discharge in my favour of the said
debts, sums of money, and obligations due and owing by me as
Acceptance of aforesaid ; **AND DECLARING** that acceptance of payment, or of a final
payment or final dividend, by any of my creditors acquiescing or acceding as afore-
dividend to im- said, shall import a discharge by them to the said trustee of his
port discharge actings and intromissions with the fund and estate hereby con-
of trustee. veyed: **AND I GRANT** full power to the said trustee to appoint law
agents under him for any of the purposes of this trust, and to allow
them a suitable remuneration: **AND DECLARING**, as it is hereby
Power to trustee provided and declared, that the said trustee shall not be obliged to
to appoint law do diligence otherwise than as he shall think fit, nor shall he be
agents. liable for omissions, but for his own actual intromissions only:
Trustee not **AND DECLARING** that the acquiescence or accession of my creditors,
liable for omis- or any of them, in or to this trust-deed, or the trust hereby created,
sions. or the granting of the said discharge in my favour, shall in no way
hurt or prejudice any claim competent to them, or any of them,
against any other person or persons who may be bound or liable
with or for me in payment of the debts due to my creditors, or any
of them ; or any action, diligence, or execution thereon, nor dis-
charge such person or persons of their liability therefor ; all which
are hereby reserved as complete and entire as if these presents had
never been granted: **AND I BIND** myself, and my heirs and execu-
tors whomsoever, to warrant the above-written conveyance and
these presents at all hands and against all mortals: **AND I CON-**
SENT to the Registration hereof for preservation and execution.—**IN**
WITNESS WHEREOF, etc.

Warrandice.

Registration
clause.

SECTION V.

MISCELLANEOUS DEEDS.

[*Note.*—There is a form of a Deed of Assumption, containing a general conveyance of the trust-estate given in Schedule (B.) appended to “The Trusts (Scotland) Act 1867;” but the following Style may be useful in cases where it is thought desirable to be more detailed.]

No. XVII—*Deed of Assumption by accepting and surviving Trustees and Executors, containing a Special Conveyance of the Trust-Estate to the original and assumed Trustees.*

WE, C. D. and E. F., the only accepting and surviving trustees and executors under the Disposition and Deed of Settlement of the deceased A. B. of Y., dated , and codicil thereto dated

: CONSIDERING THAT, by the said Disposition and Deed of Settlement the said A. B., with and under the declaration of trust, and exceptions and reservations therein expressed, gave, granted, and disposed to and in favour of us, the said C. D. and E. F., and of M. N. of O., and P. Q. of R., and of the acceptors and acceptor, survivors and survivor of us and them, and of such other persons as might thereafter be named by the said A. B. by any writing under his hand, or as might be assumed by virtue of the powers therein granted for that effect, and to and in favour of the heirs of the last survivor acting in virtue thereof, or in virtue of any appointment to be made by him or under authority thereof, the major number of the said trustees therein named, or to be assumed, surviving and accepting, and resident in Great Britain, at the time being a quorum, but in trust always for the ends, uses and purposes therein specified, and to the assignees or disponees of the said trustees or trustee, All and Whole the heritable subjects hereinafter described and disposed; and also (under the exceptions hereinafter mentioned) All and Sundry other lands, teinds and heritages, debts and sums of money heritably secured, and in general the whole real estate then pertaining to the said A. B., or which should be pertaining to him at the time of his death; EXCEPTING ONLY the lands and barony of , belonging to him, contained in a deed of entail executed by him on the

; and also the other lands and estates which he had entailed, of even date with the execution of the said trust-disposition and deed of settlement, or which he might thereafter settle by entail; together with all contracts of sale, charters, dispositions, adjudica-

Narrative.

Recital of the
trust-convey-
ance.
Heritable estate,and exceptions
therefrom;

STYLE NO. XVII.

also the conveyance of the trustor's personal estate ;

the nomination of executors, and sundry usual clauses ;

particularly a power of assumption.

tions, precepts and instruments of sasine, tacks, and other writs and evidents, rights, title-deeds, and securities of and concerning his said real and heritable estate thereby disposed and conveyed : **AND IN LIKE MANNER**, the said A. B., with and under the declaration of uses and reservations thereafter contained, gave, granted, assigned, transferred, conveyed and made over to and in favour of us, the said C. D. and E. F., and the said M. N. and P. Q., in trust, for the ends, uses and purposes thereafter specified, and to the acceptors and acceptor and survivors and survivor of us and them, and to such other person or persons as might thereafter be named by him, or as might be assumed as aforesaid, and the assignees of said trustees or trustee, the whole personal or moveable estate, goods, funds, and effects, wheresoever situated, then pertaining or belonging to him, or which should pertain or belong to him at his decease : **AND HE THEREBY** gave, granted, and committed to the trustees therein named, and the acceptors and acceptor and the survivors or survivor of them, and to the person or persons who might be named or assumed, the powers and authorities therein mentioned ; and he thereby nominated and appointed us, the said C. D. and E. F., and the said M. N. and P. Q., and the trustees to be nominated, or such of us and them as should accept of the trust thereby constituted, and the survivors or survivor of us and them, to be his executors or executor, and the only intromitters or intromitter with his personal or moveable estate, goods, and effects, excluding and debarring all others from the said office ; **AND HE THEREBY GRANTED** and committed unto us, the said C. D. and E. F., and the said M. N. and P. Q., and the acceptors or acceptor and the survivors and survivor of us and them, full power and authority from time to time, and whensoever we and they should think fit, to nominate and appoint by a writing under our and their hand any person or persons as we should think proper to the office of trustee and executor under the said disposition and deed of settlement, along with ourselves and themselves, or after our or his decease, which person or persons so to be assumed should have the same powers, privileges, and immunities in every respect, in relation to the offices thereby conferred, as if the said person or persons had been nominated by the said disposition and deed of settlement ; and he declared that the major part of the said trustees therein named and to be assumed, surviving and accepting, residing in Great Britain at the time, should be a quorum ; and he thereby declared that the said disposition and deed of settlement was granted in trust only, and for the ends, uses and purposes therein mentioned, as the said disposition and deed of settle-

Disposition of the trust-estate by the original trustees to themselves in conjunction with the new trustees.

STYLE NO. XVII. in Great Britain, at the time being a quorum, BUT IN TRUST always for the ends, uses, and purposes specified in the said disposition and deed of settlement and codicil, and to the assignees and dispo-
Heritable estate. nees of the said trustees and trustee and their foresaids, All and Whole [*here describe any lands which it is wished specially to convey*]: As ALSO All and Sundry other lands, teinds, and heritages, debts and sums of money heritably secured, and in general the whole real estate pertaining to the said A. B. at the time of his death: **EXCEPTING** only from this conveyance the lands and barony of
 belonging to him, contained in a deed of entail executed by him on the day of April ; AND ALSO the other lands and estates which he had entailed, of even date with the execution of the said deed of settlement; TOGETHER with all contracts of sale, charters, dispositions, adjudications, precepts and instruments of sasine, tacks, and other writs and evidents, rights, title-deeds, and securities of and concerning his said real and herit-
Personal estate. able estate hereby dispoed and conveyed: AND ALSO All and Sundry personal or moveable debts and sums of money, arrears of rent, feu-duties, teind-duties and interest, stock in the government or parliamentary funds, stock in any bank or banking company, and in any other public or private company, horses, cattle, sheep, or other farming stock, crops or farm produce, implements of husbandry, household furniture, plate, printed books, linens, and china, and in general the whole personal and moveable estate, goods, funds, and effects, wheresoever situated, pertaining or belonging to the said A. B. at his decease, vested in our persons, or due or addebted to us as trustees and executors foresaid, together with all bonds, bills, promissory-notes, receipts, accounts, and other vouchers and instructions of his said personal or moveable estate, funds, and effects; WITH ENTRY as at the date of the said A. B.'s decease: AND
Entry. **WE OBLIGE** ourselves to infeft ourselves, the said C. D. and E. F.,
Obligation to infeft. and the said J. K. and J. L., and our and their foresaids, but in trust always for the uses, ends and purposes foresaid, and our and their assignees, in the whole lands and other heritages before dispoed (except those subjects which are held by the tenure of bur-
Resignation. gage), to be holden *a me vel de me*, and in the whole subjects before dispoed which are held by the tenure of burgage to be holden of her Majesty in free burgage: AND WE RESIGN the said whole lands and other heritages (as well those held in burgage as those not held in burgage) in favour of ourselves and the said J. K. and J. L., and our and their foresaids, for new infeftment, BUT IN TRUST always for the uses, ends and purposes foresaid: AND WE ASSIGN the writs;
Assignment of writs and rents. AND WE ASSIGN the RENTS: AND WE GRANT warrandice, but that from
Warrandice.
Registration clause.

our own proper and respective facts and deeds only: AND WE CON- STYLE NO. XVII.
SENT to to the Registration hereof for preservation and execution.—
IN WITNESS WHEREOF, etc.

NOTE.—A minute or deed of assumption, containing a simple nomination and assumption of new trustees, is a good appointment. It is desirable, however, to have the estate formally vested in the new trustees by conveyance, although it is not necessary to complete a title in their persons until the original appointment has been vacated.

No. XVIII.—*Factory and Commission by Trustees, original and assumed, under a mutual Trust-settlement.—Power to manage heritable estate, etc.* STYLE NO. XVIII.

We, C. D., E. F., and G. H., CONSIDERING that by mutual deed of settlement, executed by the deceased A. B., and me, the said C. D., dated the day of , and registered in the Books of Council and Session the day of , the said A. B. DISPONED, ASSIGNED, CONVEYED and MADE OVER to and in favour of me, the said C. D., and my heirs and assignees, subject to the conditions, provisions, and others therein mentioned, All and Sundry lands, tenements, tacks, heritages, debts, heritable and moveable, goods, gear, sums of money, stock-in-trade, and in general the whole subjects and estate, heritable and moveable, real and personal, then owing and belonging to him, or that should be owing and belonging to him at the time of his death, with the whole rents, interest, profits and produce, and writings and title-deeds, evidents, vouchers, and securities of the same, and all that had followed or might be competent to follow thereon: AND in like manner, I, the said C. D., DISPONED, ASSIGNED, CONVEYED, and MADE OVER to and in favour of the said A. B., and his heirs and assignees, subject to the conditions, provisions, and others therein mentioned, All and Sundry the whole subjects and estate, heritable and moveable, real and personal, then owing and belonging, or which should be owing and belonging to me at my death, and the said A. B., and I, the said C. D., appointed the survivor of us to be the sole and only executor and universal intromitter of the first deceiver: AND IT WAS thereby DECLARED that the said subjects and estate of the first deceiver, or prices and proceeds thereof, if sold or realised, should be held and applied, in the first place, in payment of the whole just and lawful debts, and of the sickbed and funeral charges of the first deceiver, and, in the second place, the residue

Narrative.
Recital of the
mutual trust-
conveyance to
surviving dis-
pensee and trus-
tee.

Reciprocal
conveyance.

Recital of pur-
poses and
powers;

STYLE NO. XVIII. and remainder thereof should be held and applied by the survivor for the purposes and in the manner therein mentioned, as the said mutual deed of settlement, CONTAINING POWER to the survivor of the said A. B. and me, the said C. D., to assume any other person or persons as trustee or trustees along with or in succession to him, in manner therein written, in itself more fully bears: **AND WHEREAS** the said A. B. having died on the day of , I, the said C. D., thereupon accepted of the office of trustee and executor conferred on me by the said mutual deed of settlement, obtained myself confirmed executor to him, entered into possession of the said trust-estate, and sold and realised the moveable estate and effects of the said A. B., at least the greater part thereof, and invested part of the proceeds thereof in heritable property as directed by the said mutual deed of settlement, the titles to which were taken to me as trustee foresaid: **AND WHEREAS**, in virtue of the powers conferred on me by the said mutual deed of settlement, I, the said C. D., nominated and appointed us, the said E. F. and G. H., and the acceptors and survivors and acceptor and survivor of us, as trustees and trustee and executor along with me for executing the purposes of the said trust, **AND DISPOSED** to and in favour of us, the said C. D. and G. H., and the acceptors and survivors and acceptor and survivor of us, and to the heirs of the last survivor, as trustees and trustee foresaid, All and Whole the whole heritable and moveable trust-funds, estate, and effects of every kind and description vested in me, the said C. D., or to which I was entitled as trustee and executor foresaid, conform to deed of assumption and conveyance, executed by me upon the day of , upon which we are or are about to be infeft: **AND WHEREAS** we have considered it expedient, for the due and proper management of the said trust-estate, to appoint a factor under us, with the powers and for the purposes under written, and have accordingly resolved to appoint M. N., accountant in , to the said office: **AND NOW, SEEING** that the said M. N. having agreed to accept of the said appointment, **AND NAMED** P. Q. as his cautioner, with whose sufficiency we are fully satisfied, it is necessary that we should execute these presents in manner under written: **THEREFORE WE**, the said C. D., E. F., and G. H., do hereby **NOMINATE, CONSTITUTE** and **APPOINT** the said M. N. to be our factor, hereby **GIVING, GRANTING** and **COMMITTING** to him full power and commission for us, and in our names as trustees and executors foresaid, to enter into possession of the trust-estate, heritable and moveable, of the said deceased A. B., to realise and convert into money, at such times and in such manner as he shall deem proper, the moveable estate of the said

and particularly
a power of as-
sumption.

Decease of one
of the parties,
and acceptance
of trust by the
survivor.

Assumption
of additional
trustees;

and conveyance
of the trust-
estate.

Resolution to
appoint a factor.

Agreement by
factor to accept
and to find
caution.

Clause of ap-
pointment.

Grant of powers.

A. B., in so far as not already realised, and to uplift, receive, and discharge the prices and proceeds thereof; to collect, levy and uplift the feu-duties, ground-annuals, rents, maills, and duties, and interest and annual produce of the said heritable estate, vested, or to be hereafter vested, in us as trustees foresaid, and that as well for all arrears of preceding years as for rents yet to fall due during the subsistence of this factory; to let the heritable subjects, or any part thereof, at such rents, for such periods, and on such terms, as he may deem proper; to input and output tenants therefrom; to grant, execute, and deliver all receipts, discharges, and acquittances requisite, and to raise, commence, and follow forth all actions, suits, and diligences necessary in the premises, and to appear for and defend us in all actions, suits and diligences which may be brought against us in relation thereto: TO APPLY the arrears so to be received by him from the said heritable subjects, in keeping the same in repair, in insuring the buildings thereon against losses by fire to such extent as he shall think proper, in paying and defraying the public and parochial burdens, and the feu-duties and ground-annuals payable therefrom, and the interest of the debts with which the same or any part thereof may be burdened, and other incidental charges: AND THE BALANCE of the said feu-duties, ground-annuals, rents, and others, and the funds arising from the said personal estate, when the same shall have been realised, and the interest and produce thereof becoming due from time to time, shall be applied, IN THE FIRST PLACE, in payment of the just and lawful debts of the said A. B., so far as not already paid: AND IN THE SECOND PLACE, the same shall be paid and applied for the purposes and in the manner to be appointed by us from time to time: AND UNTIL such purposes shall be declared by us, the same shall be deposited in a chartered bank for safety; and, in general, we hereby give, grant, and commit to our said factor full power to manage, negotiate, and transact the affairs and business foresaid as fully, freely, and effectually as we could do ourselves: Hereby ratifying and obliging ourselves to hold firm all and whatever acts and deeds our said factor shall lawfully do or perform in virtue of these presents: AND IT IS hereby expressly PROVIDED and DECLARED that the said M. N. shall be bound and obliged, as by acceptance hereof he binds and obliges himself, and his heirs, executors, and successors, to hold just count and reckoning with us, as trustees and executors foresaid, for his whole actings and intromissions, in virtue of these presents: AND THE SAID P. Q. hereby BINDS himself, and his heirs, executors, and successors, all jointly and severally along with the said M. N., as cautioners, sureties, and full debtors, for his intro-

STYLE NO. XVIII.

Factor to apply rents in first instance in payment of necessary outlay, etc.

Net proceeds to be applied in payment of debts.

Surplus to be applied as trustees may appoint.

Money to be deposited in bank.

Obligation by factor to account.

Obligation by cautioner.

STYLE NO. XVIII. missions with the said trust-estate: DECLARING that the factory shall remain in full force and effect until recalled by a writing under our hands, which we hereby expressly reserve full power to ourselves at any time to do: AND WE, the whole parties, hereto consent to the Registration hereof for preservation and execution.—
IN WITNESS WHEREOF, etc.

Factory may be recalled by the trustees.
Registration for execution.

NOTE.—The narrative in this form, as well as in those which precede and follow it, has been varied, so as to exemplify the mode of detailing the circumstances and events, the recital of which is necessary to exhibit the title of the granters.

STYLE NO. XIX. No. XIX.—*Discharge and Ratification by Residuary Legatees under a Trust-Settlement.*

Narrative.
Recital of trust-conveyance, appointment of executors, and leading purposes of the trust ;

decease of truster and acceptance of trust ;

fulfilment of primary purposes ;

We, E. F., G. H., and M. N. [*names and designations of residuary legatees or beneficiaries*], CONSIDERING THAT, by trust-disposition and deed of settlement, dated the day of , and recorded in the Books of Council and Session the day of , the now deceased A. B. of X. DISPONED, ASSIGNED, CONVEYED and MADE OVER to and in favour of P. Q., R. S., T. U., and the acceptors, etc. [*narrate the terms of the disposition to trustees, and of any nomination of additional trustees, or recall of a previous appointment, and the leading provisions of the trust, for example, —payment of debts and legacies, liferent annuity to truster's widow, and residuary bequest, with power of advancement*], as the said trust-disposition and deed of settlement, containing a nomination by the said A. B. of the said trustees as his executors, and sundry other clauses, in itself more fully bears: AND WHEREAS the said A. B. deceased upon the day of , survived by the said E. B. his widow, and by us, the said E. F., G. H., and M. N. ; and the said P. Q., R. S., and T. U. accepted of the offices conferred upon them by the said trust-disposition and deed of settlement, and entered upon the possession and management of the means and estate thereby conveyed, and paid the said A. B.'s just and lawful debts so far as claimed or ascertained, and his sickbed and funeral charges, and the said legacies: AND WHEREAS the said trustees and executors, after payment of the said debts, and sickbed and funeral charges and legacies, have regularly made payment of the whole annual income and produce of the residue of the means and estate of the said A. B. to E. B., his widow, up to the term of , and the said E. B. died on the day of

[*narrating what has been already done in fulfilment of the purposes of the trust, as well as the occurrence of the various events, as deaths, the attainment of majority, etc., upon which the distribution of the whole or any part of the succession is dependent*]: AND WHEREAS the

said trustees and executors have, in virtue of the powers committed to them by the said trust-disposition and deed of settlement, advanced to each of us, the said E. F. and G. H., to account of our provisions, £ , we paying interest at the rate of five per cent. :

and that trustees have advanced portions of their shares of residue to certain of the legatees.

AND WHEREAS the said trustees and executors have submitted to us full and accurate accounts of their intromissions with the said estate, and the annual income and produce thereof, FROM WHICH IT APPEARS that the residue of the said means and estate amounts to the sum of £ , including the said advances, and the interest and produce so far as not accounted for as aforesaid: AND NOW SEE-

That trustees have accounted for their intromissions. State of balance.

ING that we have examined the said accounts and are satisfied therewith, and the said P. Q., R. S., and T. U., as trustees and executors foresaid, have now or formerly advanced and paid to or accounted for to each of us, the said E. F., G. H., and M. N., the sum of £ (including in the shares of us, the said E. F. and

Subsumption.

G. H., the sums advanced to us as aforesaid), being our one-th part or share of the said residuary fund, amounting as aforesaid to £ , of which sums so paid or accounted for, we, the said E. F., G. H., and M. N., do hereby acknowledge the receipt, renouncing all exceptions and objections to the contrary, and that it is just and proper we should execute these presents in manner under written :

That trustees have paid or accounted for the balances due to the respective legatees.

THEREFORE we, the said E. F., G. H., and M. N., and we all with joint advice and consent, for our several and respective rights and interests, do hereby RATIFY, APPROVE OF and CONFIRM the whole accounts, and whole actings, transactions and intromissions of the said P. Q., R. S., and T. U., as trustees and executors foresaid, in and with the said trust-funds and estate, and the interest and produce thereof, or in any way relating thereto: AND we do hereby EXONER, ACQUIT and DISCHARGE the said P. Q., R. S., and T. U., of their whole actings, transactions and intromissions, and also their whole omissions at and prior to the date hereof as trustees and executors foresaid, and of the said sums so paid, as in full to us of our shares of the said residue provided to us by the said trust-disposition and deed of settlement, including the said interest and produce up to the date hereof, so far as not accounted for as aforesaid: and also of the said trust-disposition and deed of settlement itself, whole clauses and provisions therein contained in our favour, and all that has followed or may be competent to follow thereon :

Clause of ratification

WHICH DISCHARGE AND RATIFICATION we bind and oblige ourselves,

and discharge

Warrantice.

ARTICLE XX. **WE** our respective rights and interests, to warrant at all hands and against all mortals as law will; as also to free and relieve, and harmless and skaitless keep, the said trustees and executors of, from and against all debts, expenses, or claims which may be due by or made against them as such trustees and executors to the extent of our several shares and proportions of interest in the estate of the said A. B. as aforesaid: **AND WE** consent to the registration hereof for preservation and execution.—**IN WITNESS WHEREOF,** etc.

APPENDIX.

4^o GEORGII IV. REGIS.

CAP. XCVIII.

An Act for the better granting of Confirmations in Scotland.—
[19th July 1823.]

"WHEREAS it is expedient that provision should be made for the better granting of confirmations in certain cases in *Scotland*;" Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this Act, in all cases of intestate succession, where any person or persons who, at the period of the death of the intestate, being next of kin, shall die before confirmation be expedite, the right of such next of kin shall transmit to his or her representatives, so that confirmation may and shall be granted to such representatives, in the same manner as confirmations might have been granted to such next of kin immediately upon the death of such intestate. Right to confirmation to transmit to representatives.

II. And be it further enacted, that from and after the first day of January One thousand eight hundred and twenty-four, caution shall not be required to be found by executors-nominate; and in all other cases the Court granting confirmation shall fix the amount of the sum for which caution shall be found by the person or persons to whom confirmation shall be granted, not exceeding the amount confirmed. Court to regulate caution to be found.

III. And be it further enacted, that from and after the first day of January One thousand eight hundred and twenty-four, every Confirmation shall confirm the whole moveable estate known at the time, to which such per- Partial confirmation to cease.

Scotch Act,
1690.

In cases of
executor's cre-
ditor, confirma-
tion to be
granted.

son shall make oath: Provided always, that it shall and may be lawful to eik to such confirmation any part of such estate that may afterwards be discovered, provided the whole of such estate so discovered shall be added upon oath as aforesaid: Provided nevertheless, that nothing herein contained shall affect or alter the provision made with respect to special assignations by an Act of the *Scotch* Parliament, made in the year One thousand six hundred and ninety, intituled *Act anent the Confirmation of Testaments*.

IV. Provided further, and be it enacted, that in the case of confirmation by executor's creditor, such confirmation may be limited to the amount of the debt and sum confirmed to which such creditor shall make oath: Provided always, that notice of every application for confirmation by any executor's creditor shall be inserted in the *Edinburgh Gazette*, at least once, immediately after such application shall be made; in evidence whereof, a copy of the *Gazette* in which such notice shall have been inserted shall be produced in Court before any such confirmation shall be further proceeded in.

18° VICTORIÆ REGINÆ.

CAP. XXIII.

An Act to alter in certain respects the Law of Intestate Moveable Succession in Scotland.—[25th May 1855.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

The issue of a
predeceasing
next of kin
shall come in
the place of
their parent in
the succession
to an intestate.

I. In all cases of intestate moveable succession in *Scotland* accruing after the passing of this Act, where any person who, had he survived the intestate, would have been among his next of kin, shall have predeceased such intestate, the lawful child or children of such person so predeceasing shall come in the place of such person, and the issue of any such child or children, or of any descendant of such child or children, who may in like manner have predeceased the intestate, shall come in the place of his or their parent predeceasing, and shall respectively have right to the share of the moveable estate of the intestate to which the parent of such child or children or of such issue, if he had survived the intestate,

would have been entitled: Provided always, that no representation shall be admitted among collaterals after brothers and sisters descendants, and that the surviving next of kin of the intestate claiming the office of executor shall have exclusive right thereto, in preference to the children or other descendants of any predeceasing next of kin, but that such children or descendants shall be entitled to confirmation when no next of kin shall compete for said office.

II. Where the person predeceasing would have been the heir in heritage of an intestate leaving heritable as well as moveable estate had he survived such intestate, his child, being the heir in heritage of such intestate, shall be entitled to collate the heritage to the effect of claiming for himself alone, if there be no other issue of the predeceaser, or for himself and the other issue of the predeceaser, if there be such other issue, the share of the moveable estate of the intestate which might have been claimed by the predeceaser upon collation if he had survived the intestate; and daughters of the predeceaser, being heirs-portioners of the intestate, shall be entitled to collate to the like effect; and where, in the case aforesaid, the heir shall not collate, his brothers and sisters, and their descendants in their place, shall have right to a share of the moveable estate equal in amount to the excess in value over the value of the heritage of such share of the whole estate, heritable and moveable, as their predeceasing parent had he survived the intestate would have taken on collation.

Issue of predeceasing heir succeeding to the intestate's heritage may collate, but other issue not excluded by his not collating from claiming out of moveable estate. Difference between value of heritage and share their parent would have taken on collation.

III. Where any person dying intestate shall predecease his father without leaving issue, his father shall have right to one-half of his moveable estate, in preference to any brothers or sisters or their descendants who may have survived such intestate.

Father to succeed to extent of one-half when no issue.

IV. Where an intestate dying without leaving issue, whose father has predeceased him, shall be survived by his mother, she shall have right to one-third of his moveable estate, in preference to his brothers and sisters or their descendants, or other next of kin of such intestate.

Where father has predeceased, mother to succeed to extent of one-third.

V. Where an intestate dying without leaving issue, whose father and mother have both predeceased him, shall not leave any brother or sister german or consanguinean, nor any descendant of a brother or sister german or consanguinean, but shall leave brothers and sisters uterine, or a brother or sister uterine, or any descendant of a brother or sister uterine, such brothers and sisters uterine and such descendants in place of their predeceasing parent shall have right to one-half of his moveable estate.

Succession by brothers and sisters uterine.

VI. Where a wife shall predecease her husband, the next of

On a wife pre-

deceasing her husband, her representatives to have no claim on the goods in communion.

kin, executors, or other representatives of such wife, whether testate or intestate, shall have no right to any share of the goods in communion, nor shall any legacy or bequest or testamentary disposition thereof by such wife affect or attach to the said goods or any portion thereof.

Not to affect rights of spouses on dissolution of marriage in certain cases.

VII. Where a marriage shall be dissolved before the lapse of a year and a day from its date, by the death of one of the spouses, the whole rights of the survivor and of the representatives of the predeceaser shall be the same as if the marriage had subsisted for the period aforesaid.

Part of Act of Parliament of Scotland, 1617, c. 14, repealed.

VIII. So much of an Act of the Parliament of *Scotland* passed in the year One thousand six hundred and seventeen, and intituled *Anent Executors*, as allows executors-nominate to retain to their own use a third of the dead's part in accounting for the moveable estate of the deceased, is hereby repealed, and executors-nominate shall, as such, have no right to any part of the said estate.

Interpretation of terms.

IX. The words "intestate succession" shall mean and include succession in cases of partial as well as of total intestacy; "intestate" shall mean and include every person deceased who has left undisposed of by will the whole or any portion of the moveable estate on which he might, if not subject to incapacity, have tested; "moveable estate" shall mean and include the whole free moveable estate on which the deceased, if not subject to incapacity, might have tested, undisposed of by will, and any portion thereof so undisposed of.

21° & 22° VICTORIÆ REGINÆ.

CAP. LVI.

An Act to amend the law relating to the Confirmation of Executors in Scotland, and to extend over all parts of the United Kingdom the effect of such Confirmation, and of Grants of Probate and Administration.—[23d July 1858.]

WHEREAS it is expedient to amend the law relating to the confirmation of executors in *Scotland*, and to extend over the United Kingdom the effect of such confirmation, and of grants of probate and administration: Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and

Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

I. From and after the twelfth day of *November* One thousand eight hundred and fifty-eight, the practice of raising edicts of executry before the Commissary Courts in *Scotland*, for the decerniture of executors to deceased persons, shall cease, and it shall not be competent to any person to obtain himself decerned executor in virtue of any such edict raised subsequently to the date aforesaid.

Practice of raising edicts of executry to cease.

II. From and after the date aforesaid every person desirous of being decerned executor of a deceased person as disponee, next of kin, creditor, or in any other character whatsoever now competent, or of having some other person, possessed of such character, decerned executor to a deceased person, shall, instead of applying, as heretofore, for an edict of executry from the Commissary, present a petition to the Commissary for the appointment of an executor, which petition shall be in the form as nearly as may be of the Schedule (A) hereunto annexed, and shall be subscribed by the petitioner or by his agent.

Petition to commissary to be substituted.

Form of petition as in schedule (A).

III. Such petition shall be presented to the Commissary of the county wherein the deceased died domiciled, and in the case of persons dying domiciled furth of *Scotland*, or without any fixed or known domicile, having personal or moveable property in *Scotland*, to the Commissary of *Edinburgh*.

To whom petition to be presented.

IV. Every such petition, in place of being published at the kirk-door and market cross, as edicts of executry have been in use to be published, shall be intimated by the Commissary-Clerk affixing on the door of the Commissary Court-house, or in some conspicuous place of the court and of the office of the Commissary-Clerk, in such manner as the Commissary may direct, a full copy of the petition, and by the Keeper of the Record of Edictal Citations at *Edinburgh* inserting in a book, to be kept by him for that purpose, the names and designations of the petitioner and of the deceased person, the place and date of his death, and the character in which the petitioner seeks to be decerned executor, which particulars the Keeper of the Record of Edictal Citations shall cause to be printed and published weekly, along with the Abstracts of the Petitions for general and special services, in the form of Schedule (B) hereunto annexed ; provided always, that to enable the Keeper of the Record of Edictal Citations to make such publication, the Commissary-Clerk shall transmit to him the said particulars, and to enable the Commissary-Clerk to grant the certificate after mentioned, the Keeper of the Record of Edictal Citations shall transmit to the Commissary-Clerk a copy, certified by the said Keeper, of the

Mode of intimating petition

printed and published particulars, all in such form and manner and on payment of such fees as the Court of Session by Act of Sederunt may direct.

Certificate of intimation of petition.

V. The Commissary-Clerk, after receiving the certified copy of the printed and published particulars, shall forthwith certify on the petition that the same has been intimated and published in terms of the provisions of this Act, in the form of Schedule (C) hereunto annexed, and such certificate shall be sufficient evidence of the facts therein set forth: provided always, that where a second petition for confirmation is presented in reference to the same personal estate, the Commissary shall direct intimation of such petition to be made to the party who presented the first petition.

Additional intimation of petition in certain cases.

Procedure on petition.

VI. On the expiration of nine days after the Commissary-Clerk shall have certified the intimation and publication of a petition for the appointment of an executor as aforesaid, the same may be called in Court, and an executor decerned, or other procedure may take place according to the forms now in use in case of edicts of executry, and with the like force and effect; and decree-dative may be extracted on the expiration of three lawful days after it has been pronounced, but not sooner: Provided always, that nothing herein contained shall alter or affect the law as to executors finding caution; and that bonds of caution for executors may be partly printed and partly written.

Decree-dative.

Proviso as to caution.

Not to affect present procedure.

VII. Provided always, that nothing hereinbefore contained shall alter or affect the course of procedure now in use before the Commissaries in confirmations of executors-nominate.

Where inventories, etc., may be recorded.
Confirmations may be granted.

VIII. Inventories of personal estates of deceased persons and relative testamentary writings may be given up and recorded in, and confirmations may be granted and issued by, any Commissary Court to which it is competent to apply in virtue of the provisions of this Act for the appointment of an executor-dative to the deceased.

Inventory may include personal estate in any part of United Kingdom.

IX. From and after the date aforesaid it shall be competent to include in the inventory of the personal estate and effects of any person who shall have died domiciled in *Scotland* any personal estate or effects of the deceased situated in *England* or in *Ireland*, or both: Provided that the person applying for confirmation shall satisfy the Commissary, and that the Commissary shall by his interlocutor find that the deceased died domiciled in *Scotland*, which interlocutor shall be conclusive evidence of the fact of domicile: Provided also, that the value of such personal estate and effects situated in *England* or *Ireland* respectively shall be separately stated in such inventory, and such inventory shall be impressed

with a stamp corresponding to the entire value of the estate and effects included therein, wheresoever situated within the United Kingdom.

X. Confirmations shall be in the form, or as nearly as may be in the form, of Schedules (D) and (E) hereunto annexed; and such confirmations shall have the same force and effect with the like writs framed in terms of the Acts of Sederunt passed on the twentieth *December* One thousand eight hundred and twenty-three and the twenty-fifth *February* One thousand eight hundred and twenty-four, or at present in use. Form and effect of confirmations.

XI. Oaths and affirmations on inventories of personal estates given up to be recorded in any Commissary Court may be taken either before the Commissary or his depute, or the Commissary-Clerk or his depute, or before any commissioner appointed by the Commissary, or before any magistrate or justice of the peace within the United Kingdom or the Colonies, or any *British* Consul. Oaths, before whom to be taken.

XII. From and after the date aforesaid, when any confirmation of the executor of a person who shall in manner aforesaid be found to have died domiciled in *Scotland*, which includes, besides the personal estate situated in *Scotland*, also personal estate situated in *England*, shall be produced in the Principal Court of Probate in *England*, and a copy thereof deposited with the Registrar, together with a certified copy of the interlocutor of the Commissary finding that such deceased person died domiciled in *Scotland*, such confirmation shall be sealed with the seal of the said Court, and returned to the person producing the same, and shall thereafter have the like force and effect in *England* as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate. Confirmation produced in Probate Court of England, and sealed, to have the effect of probate or administration.

XIII. From and after the date aforesaid, where any confirmation of the executor of a person who shall so be found to have died domiciled in *Scotland*, which includes, besides the personal estate situated in *Scotland*, also personal estate situated in *Ireland*, shall be produced in the Court of Probate in *Dublin*, and a copy thereof deposited with the Registrar, together with a certified copy of the interlocutor of the Commissary finding that such deceased person died domiciled in *Scotland*, such confirmation shall be sealed with the seal of the said Court, and returned to the person producing the same, and shall thereafter have the like force and effect in *Ireland* as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate in *Dublin*. Confirmation produced in Probate Court of Dublin, and sealed, to have the effect of probate or administration.

XIV. From and after the date aforesaid, when any probate or letters of administration to be granted by the Court of Probate in Probate or letters of administration

produced in
Commissary
Court, and cer-
tified, to have
effect of confir-
mation.

England to the executor or administrator of a person who shall be therein, or by any note or memorandum written thereon signed by the proper officer, stated to have died domiciled in *England*, or by the Court of Probate in *Ireland* to the executor or administrator of a person who shall in like manner be stated to have died domiciled in *Ireland*, shall be produced in the Commissary Court of the county of *Edinburgh*, and a copy thereof deposited with the Commissary-Clerk of the said Court, the Commissary-Clerk shall indorse or write on the back or face of such grant a certificate in the form, as near as may be, of the Schedule (F) hereunto annexed; and such probate or letters of administration, being duly stamped, shall be of the like force and effect and have the same operation in *Scotland* as if a confirmation had been granted by the said Court.

For securing
the stamp-
duties, pro-
bates, etc., to
be deemed
granted for all
the property in
the United
Kingdom.

XV. In any of the aforesaid cases where the deceased person shall be stated in or upon the probate or letters of administration to have been domiciled in *England* or in *Ireland*, as the case may be, such probate or letters of administration shall, for the purpose of securing the payment of the full and proper stamp duties, be deemed and considered to be granted for and in respect of the whole of the personal and moveable estate and effects of the deceased in the United Kingdom, within the meaning of the Act of Parliament passed in the fifty-fifth year of the reign of King *George* the Third, chapter one hundred and eighty-four, and of all other Acts of Parliament granting or relating to stamp-duties on probates and letters of administration in *England* and *Ireland* respectively; and the affidavit required by law to be made on applying for probate or letters of administration in *England* or *Ireland* as to the value of the estate and effects of the deceased; and also where the Commissary shall in manner aforesaid find that the deceased was domiciled in *Scotland*, the inventory required by law to be exhibited and recorded in the proper Commissary Court in *Scotland* before obtaining confirmation, or intromitting with or entering upon the possession or management of the personal or moveable estate or effects of the deceased in *Scotland*, shall respectively extend to and include the whole of the personal and moveable estate of the deceased person in the United Kingdom, and the value thereof; and the stamp-duties for the time being chargeable on probates and letters of administration and on inventories respectively shall be chargeable upon any probate or letters of administration to be granted, and any inventory to be exhibited and recorded as aforesaid respectively, for and in respect of the whole of the personal and moveable estate and effects of the deceased in the United Kingdom and the value thereof; and the said affidavit

Inventory to
include all such
property.

shall also separately specify the value of the said estate and effects in *Scotland*.

XVI. For the purpose aforesaid, and also for granting relief where too high a stamp-duty shall have been paid on any such probate or letters of administration, or inventory, the provisions contained in sections forty, forty-one, forty-two, and forty-three, of the said Act passed in the fifty-fifth year of his Majesty King *George* the Third, relating to probates and letters of administration granted in *England*, and the like provisions in the Act passed in the fifty-sixth year of the said King, chapter fifty-six, relating to probates and letters of administration granted in *Ireland*, and the provisions contained in the Act passed in the forty-eighth year of the said King, chapter one hundred and forty-nine, relating to inventories in *Scotland*, and also all other provisions contained in the said Acts respectively, or in any other Act or Acts relating to probates and letters of administration and inventories respectively, shall apply to the probates and letters of administration to which effect is given by this Act, and to the whole of the personal and moveable estate of the deceased for or in respect of which the same shall, in pursuance of this Act, be deemed to be granted, wheresoever situate in the United Kingdom; and also to the inventories in which the whole of the personal and moveable estate of the deceased, wheresoever situate in the United Kingdom, ought, in pursuance of this Act, to be included, in as full and ample a manner as if all such provisions were herein enacted in reference to such probates, letters of administration, and inventories respectively.

Provisions of former Acts to apply to the probates, letters of administration, and inventories mentioned in this Act.

XVII. Provided, that in any case where, on applying for probate or letters of administration, it shall be required to be stated as aforesaid that the deceased was domiciled in *England* or in *Ireland*, the affidavit so as aforesaid required by law shall specify the fact according to the deponent's belief, which shall be sufficient to authorise the same to be so stated in or upon the probate or letters of administration; Provided also, that any such statement, and the interlocutor of the Commissary finding that the deceased was domiciled in *Scotland*, shall be evidence, and have effect for the purposes of this Act only.

Affidavit as to domicile to be made on applying for probate or administration.

XVIII. It shall be competent to the Court of Session, and they are hereby authorised and required, from time to time to pass such Acts of Sederunt as shall be necessary and proper for regulating in all respects the proceedings under this Act before the Commissary of *Edinburgh* and other Commissaries in *Scotland*, and following out the purposes of this Act, and also the fees to be paid

Acts of Sederunt to be passed for following out purposes of this Act.

to agents before the said Courts, and to the Commissary-Clerks and other officers of Court, and the expense of publication of petitions.

Former Acts of Sederunt repealed if inconsistent with this Act.

XIX. All former Acts, and Acts of Sederunt made in virtue thereof, so far as inconsistent with the present Act, are hereby repealed; and this Act may be amended or repealed by any Act to be passed during the present Session of Parliament, and may be cited as the "Confirmation and Probate Act 1858."

Interpretation of terms.

XX. The word "Commissary" shall include Commissary-Depute, and the term "Commissary-Clerk" shall include Commissary-Clerk-Depute.

SCHEDULES to which the foregoing Act refers.

SCHEDULE (A).

Form of a Petition for Appointment of an Executor to a deceased person.

Unto the Honourable the Commissary of [*specify the county*], the
Petition of *A. B.* [*here name and design the petitioner*];

Humbly sheweth,

That the late *C. D.* [*here name and design the deceased person to whom an executor is sought to be appointed*] died at [*specify place*] on or about the [*specify date*], and had at the time of his death his ordinary or principal domicile in the county of [*specify county, or "furth of Scotland," or "without any fixed domicile," or "without any known domicile," as the case may be*].

That the petitioner is the only son and next of kin [*or state what other relationship, character, or title the petitioner has, giving him right to apply for the appointment of executor*].

May it therefore please your Lordship to decern the petitioner executor-dative *qua* next of kin to the said *C. D.* [*or state the other character in which the petitioner claims to be appointed executor*].

According to Justice, etc.

[*Signed by the petitioner or his agent.*]

SCHEDULE (B).

Roll of Petitions for the appointment of Executors in Commissary Courts in Scotland.

County.	Name and Designation of Petitioner.	Title of Petitioner.	Name and Designation of Defunct.	Place and Date of Death.
Edinburgh.	A. B., Writer in Edinburgh.	Next of Kin.	C. D., Merchant in Edinburgh.	No. George Street, Edinburgh, 1st Jan. 1857.

SCHEDULE (C).

Form of Certificate by Commissary-Clerk of publication of a Petition for the appointment of an Executor.

I, A. B., Commissary-Clerk [or “ Commissary-Clerk-Depute,” as the case may be], of the county of [specify county], hereby certify that this petition was intimated by affixing a copy thereof on the door of the Court-house [if some other place has been directed by the Commissary, specify it], on the [specify date], and by being published by the Keeper of the Record of Edictal Citations at Edinburgh, in the printed roll of petitions for the appointment of executors in the Commissary Courts of Scotland, printed and published on [specify date].

SCHEDULE (D).

Form of a Testament-Dative or Confirmation of the Executor of a person who has died without naming one.

I, A. B., Commissary of the county of [specify county], considering that by my decree, dated [specify date], I decerned C. D. executor-dative qua next of kin [or other character, as the case may be] of the late E. F., who died at [specify place] on [specify date], and seeing that the said C. D. has since given up on oath an inventory of the personal estate and effects of the said E. F. at the time of his death situated in Scotland [or situated in Scotland and England, or in Scotland and Ireland, or in Scotland, England, and Ireland, as the case may be], amounting in value to pounds, which inventory has been recorded in my Court Books, of date

[*specify date*], and that he has likewise found caution for his acts and intromissions as executor: Therefore I, in her Majesty's name and authority, make, constitute, ordain, and confirm the said *C. D.* executor-dative *qua* [*specify character*] to the defunct, with full power to him to uplift, receive, administer, and dispose of the said personal estate and effects, and grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of executor-dative *qua* [*specify character*] is known to belong; providing always that he shall render just count and reckoning for his intromissions therewith when and where the same shall be legally required.

Given under the Seal of Office of the Commissariat [*specify county*], and signed by the Clerk of Court at [*specify place*], the [*specify date*].

To be signed by the Commissary-Clerk or his Depute, and sealed with the Seal of Office.

SCHEDULE (E).

Form of a Testament-Testamentar or Confirmation of an Executor-Nominate.

I, *A. B.*, Commissary of the county of [*specify county*], considering that the late *C. D.* died at [*specify place*], upon [*specify date*], and that by his last will [*or other writing containing the nomination of executor*], dated [*specify date*], and recorded in my Court Books upon [*specify date*], the said *C. D.* nominated and appointed *E. F.* to be his executor, and that the said *E. F.* has given up on oath an inventory of the personal estate and effects of the said *C. D.* at the time of his death situated in Scotland [*or situated in Scotland and England, or situated in Scotland and Ireland, or situated in Scotland, England, and Ireland, as the case may be*], amounting in value to pounds, which inventory has likewise been recorded in my Court Books of date [*specify date*]: Therefore I, in her Majesty's name and authority, ratify, approve, and confirm the nomination of executor contained in the foresaid last will [*or other writing containing the nomination of executor*]; and I give and commit to the said *E. F.* full power to uplift, receive, administer, and dispose of the said personal estate and effects, grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of an executor-nominate is known to belong; providing always that he shall render

just count and reckoning for his intromissions therewith when and where the same shall be legally required.

Given under the Seal of Office of the Commissariat at [*specify county*], and signed by the Clerk of Court at [*specify place*], the [*specify date*].

To be signed by the Commissary-Clerk or his Depute, and sealed with the Seal of Office.

SCHEDULE (F).

I, *A. B.*, Commissary-Clerk [*or* Commissary-Clerk-Depute] of the county of Edinburgh, hereby certify that this grant of probate has [*or* these letters of administration have] been produced in the Commissary Court of the said county, and that a copy thereof has been deposited with me.

22° VICTORIÆ REGINÆ.

CAP. XXX.

An Act to amend the "Confirmation and Probate Act, 1858."—
[19th April 1859.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

I. All persons and corporations who, in reliance upon any instrument purporting to be a confirmation granted under the "Confirmation and Probate Act, 1858," and all persons and corporations who, in reliance upon any such instrument which may be sealed under the authority of the said Act with the seal of the Principal Court of Probate in *England* or of the Court of Probate in *Dublin*, and all persons or corporations who, in reliance upon any instrument purporting to be a probate or letters of administration granted by the Court of Probate in *England* or Court of Probate in *Dublin*, and having indorsed or written thereon a certificate by the Commissary-Clerk of *Edinburgh*, in the form in the said Confirmation and Probate Act prescribed, shall have made or permitted to be made, or shall make or permit to be made, any payment or transfer *bona fide* upon any such confirmation, probate, or letters of administration,

Persons, etc., making payments upon confirmations and probates under Act 1858 to be indemnified.

shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of such confirmation, probate, or letters of administration.

Short title.

II. This Act may be cited as the "Confirmation and Probate Amendment Act, 1859."

24° & 25° VICTORIÆ REGINÆ.

CAP. LXXXIV.

An Act to amend the Law in Scotland relative to the Resignation, Powers, and Liabilities of Gratuitous Trustees.—[6th August 1861.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

What trusts hereafter constituted shall be held to include.

I. All trusts constituted by virtue of any deed or local Act of Parliament under which gratuitous trustees are nominated shall be held to include the following provisions, unless the contrary be expressed; that is to say, power to any trustee so nominated to resign the office of trustee; power to such trustee, if there be only one, or to the trustees so nominated, or a quorum of them, to assume new trustees; a provision that the majority of the trustees accepting and surviving shall be a quorum; and a provision that each such trustee shall only be liable for his own acts and intromissions, and shall not be liable for the acts and intromissions of co-trustees, and shall not be liable for omissions.

Not to affect liabilities incurred by trustees prior to resignation, etc.

II. Nothing contained in this Act shall affect any liability incurred by any gratuitous trustee prior to the date of any resignation or assumption under the provisions of this Act, nor any action at law commenced before the passing of this Act.

Construction of the term "Gratuitous trustee."

III. A gratuitous trustee shall, for the purposes of this Act, be held to be any trustee who receives no pecuniary or valuable consideration for performing the duties of a trustee, and is under no obligation, without special acceptance of such office, to discharge the duties of trustee: Provided always, that nothing in this Act shall extend to any trustee appointed under the contract of any trading company.

24° & 25° VICTORIÆ REGINÆ.

CAP. CXIV.

An Act to Amend the Law with respect to Wills of Personal Estate made by British Subjects.—[6th August 1861.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. Every will and other testamentary instrument made out of the United Kingdom by a *British* subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in *England* and *Ireland* to probate, and in *Scotland* to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicile of origin.

Wills made out of the Kingdom to be admitted if made according to the law of the place where made.

II. Every will and other testamentary instrument made within the United Kingdom by any *British* subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in *England* and *Ireland* to probate, and in *Scotland* to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

Wills made in the Kingdom to be admitted if made according to local usage.

III. No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same.

Change of domicile not to invalidate will.

IV. Nothing in this Act contained shall invalidate any will or other testamentary instrument as regards personal estate which would have been valid if this Act had not been passed, except as such will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by this Act.

Nothing in this Act to invalidate wills otherwise made.

V. This Act shall extend only to wills and other testamentary instruments made by persons who die after the passing of this Act.

Extent of Act.

24° & 25° VICTORIÆ REGINÆ

CAP. CXXI.

An Act to Amend the Law in relation to the Wills and Domicile of British subjects dying whilst resident abroad, and of Foreign Subjects dying whilst resident within her Majesty's Dominions.
—[6th August 1861.]

WHEREAS by reason of the present law of domicile the wills of *British* subjects dying whilst resident abroad are often defeated, and their personal property administered in a manner contrary to their expectations and belief; and it is desirable to amend such law, but the same cannot be effectually done without the consent and concurrence of foreign States: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by authority of the same, as follows:

No British subject dying in a foreign country to be deemed to have acquired a domicile unless resident there for one year immediately preceding his or her death, etc., and for all purposes of testate or intestate succession shall retain the domicile possessed at the time of going to reside in such foreign country.

I. Whenever her Majesty shall by convention with any foreign State agree that provisions to the effect of the enactments herein contained shall be applicable to the subjects of her Majesty and of such foreign State respectively, it shall be lawful for her Majesty by any order in Council to direct, and it is hereby enacted, That from and after the publication of such order in the *London Gazette* no *British* subject resident at the time of his or her death in the foreign country named in such order shall be deemed under any circumstances to have acquired a domicile in such country unless such *British* subject shall have been resident in such country for one year immediately preceding his or her decease, and shall also have made and deposited in a public office of such foreign country (such office to be named in the Order in Council) a declaration in writing of his or her intention to become domiciled in such foreign country; and every *British* subject dying resident in such foreign country, but without having so resided and made such declaration as aforesaid, shall be deemed, for all purposes of testate or intestate succession as to moveables, to retain the domicile he or she possessed at the time of his or her going to reside in such foreign country as aforesaid.

No foreign subject dying in Great Britain or Ireland to be

II. After any such convention as aforesaid shall have been entered into by her Majesty with any foreign State, it shall be lawful for her Majesty by Order in Council to direct, and from and after

the publication of such order in the *London Gazette* it shall be and is hereby enacted, that no subject of any such foreign country who at the time of his or her death shall be resident in any part of *Great Britain* or *Ireland* shall be deemed under any circumstances to have acquired a domicile therein, unless such foreign subject shall have been resident within *Great Britain* or *Ireland* for one year immediately preceding his or her decease, and shall also have signed, and deposited with her Majesty's Secretary of State for the Home Department a declaration in writing of his or her desire to become and be domiciled in *England*, *Scotland*, or *Ireland*, and that the law of the place of such domicile shall regulate his or her moveable succession.

deemed to have acquired a domicile unless resident therein for one year immediately preceding his or her death, etc.

III. This Act shall not apply to any foreigners who may have obtained letters of naturalisation in any part of her Majesty's dominions.

Who this Act shall not apply to.

IV. Whenever a convention shall be made between her Majesty and any foreign state, whereby her Majesty's consuls or vice-consuls in such foreign state shall receive the same or the like powers and authorities as are hereinafter expressed, it shall be lawful for her Majesty by Order in Council to direct, and from and after the publication of such order in the *London Gazette* it shall be and is hereby enacted, that whenever any subject of such foreign state shall die within the dominions of her Majesty, and there shall be no person present at the time of such death who shall be rightfully entitled to administer to the estate of such deceased person, it shall be lawful for the consul, vice-consul, or consular agent of such foreign state within that part of her Majesty's dominions where such foreign subject shall die, to take possession and have the custody of the personal property of the deceased, and to apply the same in payment of his or her debts and funeral expenses, and to retain the surplus for the benefit of the persons entitled thereto; but such consul, vice-consul, or consular agent shall immediately apply for, and shall be entitled to obtain from the proper court, letters of administration of the effects of such deceased person, limited in such manner and for such time as to such court shall seem fit.

When subjects of foreign states shall die in her Majesty's dominions, and there shall be no persons to administer to their estates, the consuls of such foreign states may administer.

26° & 27° VICTORIÆ REGINÆ.

CAP. CXV.

An Act to explain the Act for the Amendment of the Law relative to Gratuitous Trustees in Scotland.—[28th July 1863.]

WHEREAS an Act was passed in the twenty-fourth and twenty-fifth years of the reign of her present Majesty, intituled *An Act to amend the Law in Scotland relative to the Resignation, Powers, and Liabilities of Gratuitous Trustees*: and whereas doubts have arisen as to the trusts to which the recited Act applies: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Recited Act to
apply to trusts
at whatever
time constituted.

I. The recited Act is and shall be applicable to all trusts constituted by virtue of any deed or local Act of Parliament under which gratuitous trustees are nominated, at whatever time such trusts may have been or may be constituted.

Acts to extend
to gratuitous
trustees *ex*
officio.

II. The expression "gratuitous trustees" in the recited Act and this Act shall extend to and include gratuitous trustees who are appointed or who hold *ex officio*.

30° & 31° VICTORIÆ REGINÆ.

CAP. XCVII.

An Act to facilitate the Administration of Trusts in Scotland.—
[12th August 1867.]

WHEREAS by the Acts twenty-fourth and twenty-fifth *Victoria*, chapter eighty-four, and twenty-sixth and twenty-seventh *Victoria*, chapter one hundred and fifteen, certain powers are conferred on gratuitous trustees in *Scotland*, and it is expedient that greater facilities should be given for the administration of trust-estates in *Scotland*:

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal,

and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. In the construction of this Act and of the said recited Acts the words "Trusts and Trust Deeds" shall be held to mean and include all trusts constituted by virtue of any deed or by private or local Act of Parliament; and the words "gratuitous trustees" in the sense of this Act and of the said recited Acts shall mean and include all trustees who are not entitled as such to remuneration for their services in addition to any benefit they may be entitled to under the trust, or who hold the office *ex officio*, and shall extend to and include all trustees, whether original or assumed who are entitled to receive any legacy or annuity or bequest under the trust: Provided always that no trustee to whom any legacy or bequest or annuity is expressly given on condition of the recipient thereof accepting the office of trustee under the trust shall be entitled to resign the office of trustee by virtue of this or of the said recited Acts, unless otherwise expressly declared in the trust-deed.

Definition of trusts and trust-deeds.

II. In all such trusts the trustees shall have power to do the following acts, where such acts are not at variance with the terms or purposes of the trust, and such acts when done shall be as effectual as if such powers had been contained in the trust-deed, viz.:

General powers of trustees.

1. To appoint factors and law-agents, and to pay them a suitable remuneration:
2. To discharge trustees who have resigned, and the representatives of trustees who have died:
3. To grant leases of the heritable estate of a duration not exceeding twenty-one years for agricultural lands, and thirty-one years for minerals, and to remove tenants:
4. To uplift, discharge, or assign debts due to the trust-estate:
5. To compromise or to submit, and refer all claims connected with the trust-estate:
6. To grant all deeds necessary for carrying into effect the powers vested in the trustees:
7. To pay debts due by the truster or by the trust-estate without requiring the creditors to constitute such debts where the trustees are satisfied that the debts are proper debts of the trust.

III. It shall be competent to the Court of Session, on the petition of the trustees under any trust deed, to grant authority to the trustees to do any of the following acts, on being satisfied that the same is expedient for the execution of the trust and not inconsistent with the intention thereof; and the Court shall determine all

Powers which may be granted to trustees by the Court.

questions of expenses in relation to such applications, and where it shall be of opinion that the expense of any such application should not be charged against the trust-estate, it shall so find in disposing of the application:

1. To sell the trust-estate or any part of it:
2. To grant feus or long leases of the heritable estate or any part of it:
3. To borrow money on the security of the trust-estate or any part of it:
4. To excamb any part of the trust-estate which is heritable:

Provided always, that when all the beneficiaries under the trust in existence at the date of presenting such petition are of full age and capable of acting, it shall be in their power, by deed of consent, to grant authority to the trustees to do any of the said Acts, the same not being inconsistent with the intention of the trust; and such authority being obtained, the said Acts, when done, shall be equally valid and effectual as if the authority of the Court for the execution of the same had previously been obtained.

Extension of
powers of trus-
tees for sale.

IV. All powers of sale conferred on trustees by the trust-deed, or by virtue of this Act, may be exercised either by public roup or private bargain, unless otherwise directed in the trust-deed or in the authority given by the Court, or in the deed of consent to be granted by the beneficiaries; and when the estate is heritable, it shall be lawful in such sales to sell, subject to or under reservation of a feu-duty or ground-annual, at such rate and on such conditions as may be agreed upon; and in all sales and feus it shall be lawful to reserve the mines and minerals if so wished.

Powers of trus-
tees under
trust-deeds with
respect to in-
vestments.

V. Trustees under any trust-deed may, unless the contrary be expressly provided in such trust-deed, invest the trust-funds in the purchase of any of the government stocks, public funds, or securities of the United Kingdom, or stock of the Bank of *England*, or may lend the trust-funds on the security of any of the aforesaid stocks or funds, or on the security of heritable property in *Scotland*, and may from time to time at their discretion vary any such investment or loan: Provided that the trustees shall not be held to be subject as defendants or respondents to the jurisdiction of any of her Majesty's Superior Courts of Law or Equity in *England* or *Ireland*, either as trustees or personally, by reason of their having invested or lent trust-funds as aforesaid.

Powers of in-
vestment in
trust-deeds not
to be restricted.

VI. The powers of investment conferred by this Act shall not be held or construed as restricting or controlling any powers of investment of trust-funds expressly contained in any trust-deed.

The Court may

VII. The Court may from time to time, under such conditions

as they see fit, authorise trustees to advance any part of the capital of a fund destined, either absolutely or contingently, to minor descendants of the truster, being beneficiaries having a vested interest in such fund, if it shall appear that the income of the fund is insufficient or not applicable to, and that such advance is necessary for the maintenance or education of such beneficiaries, or any of them, and that it is not expressly prohibited by the trust-deed, and that the rights of parties other than the heirs or representatives of such minor beneficiaries shall not be thereby prejudiced.

authorise the advance of part of the capital of a trust-fund.

VIII. The Court may, on petition by the trustees, and after such intimation and inquiry as may be thought necessary, authorise the trustees under any trust-deed to apply the whole or any part of trust-funds which they are empowered or directed by the trust-deed to invest in the purchase of heritable property to the payment or redemption of any debt or burden affecting heritable property which may be destined to the same series of heirs, and subject to the same conditions as are by the trust-deed made applicable to the heritable property directed to be purchased; provided always, that such application shall not be inconsistent with the other provisions of the trust-deeds.

Application of trust-funds.

IX. When a trustee who resigns, or the representatives of a trustee who has died or resigned, cannot obtain a discharge of his acts and intromissions from the remaining trustees, and when the beneficiaries of the trust refuse, or are unable from absence, incapacity, or otherwise, to grant a discharge, the Court may, on petition to that effect at the instance of such trustee or representative, and after such intimation and inquiry as may be thought necessary, grant such discharge, and it shall be in the power of the Court to direct that the expense of such application be paid out of the trust-estate, if the Court shall consider this reasonable.

Discharge of trustees resigning, and heirs of trustees dying, during the subsistence of the trust.

X. Any trustee entitled to resign his office may do so by minute of the trust entered in the sederunt book of the trust, and signed in such sederunt book by such trustee and by the other trustee or trustees acting at the time, or he may do so by signing a minute of resignation, in the form of the Schedule (A) to this Act annexed, or to the like effect, and may register the same in the books of Council and Session, and in such case he shall be bound to intimate the same to his co-trustee or trustees, and the resignation shall be held to take effect from and after the expiry of one calendar month after the date of such intimation, or the last date thereof if more than one, if the trustee or trustees to whom such intimation was given is within *Scotland*, or otherwise within three months from and after that date; and in case after inquiry

Form of resignation of the trustees.

the residence of any trustee to whom intimation should be given under this provision cannot be found, such intimation shall be given edictally in usual form, and the resignation in that case shall be held to take effect from and after the expiry of six months: and if any trustee entitled to resign his office is at the time sole trustee, he shall not be entitled to resign until, with the consent of the beneficiaries under the trust of full age and capable of acting at the time, he shall have assumed new trustees, who shall have declared their acceptance of office, or he may apply to the Court stating his wish to resign, and praying for the appointment of new trustees or of a judicial factor to administer the trust, and the Court, after intimation to the beneficiaries under the trust, or such of them as the Court may direct, shall thereafter either appoint a judicial factor, or, on the application of the beneficiaries or any of them, may appoint trustees in the same manner as is provided under the twelfth section of this Act; and after such appointment either of judicial factor or of trustees, the petitioning trustee will be entitled to resign; and any retiring trustee or trustees who may have already retired shall be bound, when required, and at the expense of the trust, to execute all deeds necessary for divesting them of trust-property, conveying the same to the trustees or trustee or judicial factor acting in the execution of the trust.

Appointment
of new or ad-
ditional trustees
by deed of as-
sumption.

XI. When trustees have the power of assuming new trustees, such new trustees may be assumed by a deed of assumption executed by a trustee or trustees acting under such trust-deed, or by a quorum of such trustees, if more than two, in the form of the Schedule (B) to this Act annexed, or to the like effect; and a deed of assumption so executed, in addition to a general conveyance of the trust-estate, may contain a special conveyance of heritable property, and in such case may, with the necessary warrant of registration thereon, be recorded in the Register of Sasines, and when so recorded shall be effectual as a conveyance of the heritable property belonging to the trust-estate, so far as specially conveyed, in favour of the existing trustees and the trustees so to be assumed; and such deed of assumption shall also be effectual as an assignation in favour of such existing and assumed trustees of the whole personal property belonging to the trust-estate; and in the event of any trustee acting under any trust-deed being insane, or incapable of acting by reason of physical or mental disability, or by continuous absence from the United Kingdom for a period of six calendar months or upwards, such deed of assumption may be executed by the remaining trustee or trustees acting under such trust-deed:

Provided that when the signatures of a quorum of trustees cannot be obtained it shall be necessary to obtain the consent of the Court to such deed of assumption on application either by the acting trustee or trustees, or by any one or more of the beneficiaries under the trust-deed.

XII. When trustees cannot be assumed under any trust-deed, or when any person who is the sole trustee acting under any such trust-deed has become insane, or incapable of acting by reason of physical or mental disability, the Court may, upon the application of any party having interest in the trust-estate, after such intimation and inquiry as may be thought necessary, appoint a trustee or trustees under such trust-deed, with all the powers incident to that office; and on such appointment being made, in the case of any person becoming insane or incapable of acting as aforesaid, such person shall cease to be a trustee under such trust-deed; and the Court may on such application grant a warrant to complete a title to any heritable property forming part of the trust-estate in favour of the trustee or trustees so appointed, which warrant shall specify and describe the heritable property to which it is applicable, and shall also specify the moveable or personal property, or bear reference to an inventory appended to the petition to the Court in which such moveable or personal property is specified; and such warrant shall be effectual as a conveyance of such heritable property in favour of the trustee or trustees so appointed, in like manner and to the same effect as a warrant in favour of a judicial factor granted under the authority of the thirty-eighth section of "The Titles to Land (*Scotland*) Act, 1860," and shall also be effectual as an assignation of such moveable or personal property in favour of the trustee or trustees so appointed.

Appointment
of new trustees
by the Court.

XIII. Trustees appointed by the Court shall not have the power of assuming new trustees, unless such power is expressly conferred upon them by the Court.

Powers of trustees appointed
by the Court.

XIV. When any person shall be entitled to the possession for his own absolute use of any heritable property or moveable or personal property the title to which has been taken in the name of any trustee, or curator bonis, or factor *loco absentis*, or factor *loco tutoris*, or judicial factor, or other person who has died or become incapable of acting, without having executed a conveyance of such property, it shall be lawful for the person beneficially entitled to such property, to apply by petition to the Court for authority to complete a title to such property in his own name, and such petition shall specify and describe the heritable property, and refer to an inventory in which the moveable or personal property is spe-

Completion of
title by the
beneficiary of
a lapsed trust.

cified, to which such title is to be completed; and, after such intimation and inquiry as may be thought necessary it shall be lawful for the Court to grant a warrant for completing such title as aforesaid, which warrant shall specify and describe the heritable property to which it is applicable, and shall also specify the moveable or personal property, or shall bear reference to an inventory appended to the petition in which such personal property is specified; and such warrant shall be effectual as a conveyance of such heritable property in favour of the petitioner in like manner and to the same effect as a warrant in favour of a judicial factor granted under the authority of the thirty-eighth section of "The Titles to Land (*Scotland*) Act, 1860," and shall also be effectual as an assignation of such moveable or personal property in favour of the petitioner.

Completion of
title of judicial
factors.

XV. Application for authority to complete the title of a judicial factor to any trust-property or estate under the thirty-eighth section of "The Titles to Land (*Scotland*) Act 1860," may be contained in the petition for the appointment of such factor, and such application may include moveable or personal property; and the warrant to be granted in pursuance thereof shall, in so far as regards heritable property, be effectual as a conveyance in manner specified in the said Act and in the preceding section of this Act.

Powers of the
Court under this
Act to be exer-
cised by the
Lord Ordinary.

XVI. Applications to the Court under the authority of this Act shall be by petition addressed to the Court, and shall be brought in the first instance before one of the Lords Ordinary officiating in the Outer-House, who may direct such intimation and service thereof and such investigation or inquiry as he may think fit, and the power of the Lord Ordinary before whom the petition is enrolled may be exercised by the Lord Ordinary on the Bills during vacation, and all such petitions shall, as respects procedure, disposal, and review, be subject to the same rules and regulations as are enacted with respect to petitions coming before the Junior Lord Ordinary in virtue of the Act twentieth and twenty-first *Victoria*, chapter fifty-six: Provided that when in the exercise of the powers pertaining to the Court of appointing trustees and regulating trusts it shall be necessary to settle a scheme for the administration of any charitable or other permanent endowment, the Lord Ordinary shall, after preparing such schemes, report to one of the Divisions of the Court, by whom the same shall be finally adjusted and settled; and in all cases where it shall be necessary to settle any such scheme, intimation shall be made to her Majesty's Advocate, who shall be entitled to appear and intervene for the interests of the charity or any object of the trust or the public interest.

Court may pass

XVII. The Court shall be and is hereby empowered from time

to time from and after the passing of this Act to make such regulations by Act or Acts of Sederunt as may be requisite for carrying into effect the purposes of this Act: Provided that within fourteen days from the commencement of every future Session of Parliament there shall be laid before both Houses of Parliament copies of all Acts of Sederunt made and passed under the powers of this Act.

XVIII. In all cases where a trust-deed appoints the trustees to be also executors, the resignation of any such trustee shall infer, unless where otherwise expressly declared, his resignation also as an executor under such trust-deed.

Acts of Sederunt.

Resignation of trustee who is also executor to infer resignation as executor.

XIX. Nothing in this Act contained shall be construed as innovating, revoking, or restricting any express powers or directions given to trustees acting under any trust-deed, or shall affect the decision of any question which may at the passing of this Act be the subject of a depending action; and none of the powers and incidents by this Act conferred or annexed to the office of trustee shall take effect or be exercised if it is declared in the trust-deeds that they shall not take effect; and when there is no such declaration, then if any variations or limitations of any of the powers or incidents by the Act conferred or annexed are contained in such trust-deed, such powers or incidents shall take effect or be exercised only subject to such variations or limitations.

Reservation of powers in trust-deeds and questions under depending actions, and powers, &c. given by this Act may be negatived by express declaration.

XX. This Act may be cited for all purposes as "The Trusts Short title. (Scotland) Act 1867."

SCHEDULES.

SCHEDULE (A).

Form of Minute of Resignation.

I, *A. B.*, do hereby resign as and from the date hereof the office of trustee under the trust-disposition and settlement (*or other deed*) granted by *C. D.* in favour of *E. F.*, *G. H.*, and myself, dated the _____ day of _____, and recorded in the Books of Council and Session (*or other register*) the _____ day of _____.

[*If the trustee was assumed add*, and to which office of trustee I was assumed by deed of assumption granted by the said *E. F.* and *G. H.*, dated the _____ day of _____.] In witness whereof

[*testing clause in the usual form*].

SCHEDULE (B).

Form of Deed of Assumption.

I, *A. B.* [*or we, A. B. and C. D.*], the accepting and surviving [*or remaining*] trustee [*or trustees, or a majority and quorum of the accepting and surviving trustees*], acting under a trust-disposition and deed of settlement (*or other deed*) granted by *E. F.* in favour of _____, dated the _____ day of _____ [*if recorded, specify register and date of recording*], do hereby assume *G. H.* [*or G. H. and I. K.*] as a trustee [*or trustees*] under the said trust-disposition and settlement (*or other deed*); and I [*or we*] dis-
 pone and convey to myself [*or ourselves*] and the said *G. H.* [*or G. H. and I. K.*] as trustees under the said trust-disposition and settlement (*or other deed*), and the survivors or survivor, and the heirs of the last survivor, the majority, while more than two are acting, being a quorum, all and sundry the whole trust-estate and effects, heritable and moveable, real and personal, of every description, or wherever situated, at present belonging to or under my (*or our*) control as trustees (*or surviving trustees, or otherwise, as the case may be*), under the said trust-disposition and settlement, together with the whole vouchers, titles, and instructions thereof. (*Then may follow, if wished, special conveyances of heritable or personal property with the usual clauses of a conveyance applicable to such property, and as the case may require.*) And we consent to Registration hereof for preservation, and also in the General or Particular [*or Burgh*] Register of Sasines for publication. IN WITNESS WHEREOF [*testing clause in the usual form*].

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